SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 531

ELMER HARTZEL, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 8253

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ELMER HARTZEL, Defendant-Appellant

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

[fol. 1] [Caption omitted]

* * * * * * *

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Of the November Term, in the year 1942. 33721

INDICTMENT—Filed December 18, 1942

Count One

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

The grand jurors for the United States of America duly empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois, at the November Term of said Court in the year 1942, and inquiring for the said division and district, upon their oaths do present and charge that

Elmer Hartzel,
Elmer William Soller, and
Newell Mecartney,

hereinafter called the defendants, whose full and true names other than as herein stated are unknown to the grand jurors, heretofore, on or about, to wit, the 26th day of June, 1942, in the division and district aforesaid, and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly, and feloniously obstruct the recruiting and enlistment service of the United States, to the injury

of the service of the United States, the United States being then and there at war, by wilfully preparing and causing to be prepared at Chicago, Illinois, a certain document, writing and article, hereinafter set forth, and by wilfully publishing, circulating, distributing and disseminating, and causing the publication, distribution and dissemination of, said documents, writing and article in Chicago, Illinois, and at other places throughout the United States, to and among certain individuals and organizations, whose names, because of their large number and lack of information on the part of the said grand jurors, it is impracticable and impossible herein to set out in full, among whom were a large number of persons who were then and there available and eligible for recruiting and enlistment in the military and [fol. 3] naval forces of the United States, as well as persons who were then and there liable for military and naval service of the United States under the provisions of an Act of Congress entitled, "The Selective Training and Service Act of 1940," approved September 16, 1940, and Acts amendatory and supplemental thereto, which said certain document, writing and article was entitled, "The British: An Inferior Breed", and was and is in words and tenor as follows: to wit:

THE BRITISH:
AN INFERIOR BREED

Are they degenerate?

Plainly. Never again shall they be permitted to try to bring the slinking death of starvation to Europe, squealing hysterically as they do so about "freedom".

What is the present position of our "protectors", proclaimed saviors of Poland?

Now on the lease-lend dole, they are a kept woman.

Are they a cultured people?

Standing as an outpost to the continent of Europe, they are a parasite on its art, science and civilization.

In what way are they kept flying?

The Germans keep 'em flying wherever they find them. They run at the mouth as well as the bowels.

Will the British Isles be policed?

It will be unnecessary. When the people upon whom they are fastened withdraw their support, they will collapse.

What is the new blasphemy?

Making Christianity a slimy thing for those who crawl and creep by an island breed which—possessed of an empire obtained by aggression—points the finger of guilt at others. They are now fighting for Christ with bloody Joe.

Who betrayed America to the empire of the British-Jewish yellow race?

Rosenfeldt. We are victims of his Infantilism; he cannot stand alone.

Are Jews rushing forward to war after urging you to crush 'em?

No. But when America is exhausted they, as in Russia, will slither forth to sink their fangs into its body.

[fol. 4] *Are Americans united?*

Yes. Externally with the corpus of a degenerate empire; internally with the sick body of "our leader."

What is behind the doctrine of "no appeasement"?

The fear of aggression on the bloated domains of an empire which cannot stand alone;

The inhuman cruelty of America's first blood soaked boom;

The rumble of world revolution—a repercussion of its indecencies;

The effort of the Jew—vicious persecutor of peoples—to save himself;

The disease of a Paralytic who wants to be a hero as compensation for his ailment;

The beginning of insanity as the masses of the so-called "democracies" are led toward the destruction of Europe, homeland of the West.

Why was Pearl Harbor evidence of justice?

While trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific. Like a cow hit on the head by a hammer when led to slaughter, we now follow "our leader" as he moves forward on a sick spine to war.

which said document, writing and article, as the defendants, and each of them, then and there well knew, was calculated and intended by the said defendants to induce said persons available and eligible for recruiting and enlist-

ment in the military and naval forces of the United States as aforesaid, to fail and refuse to enlist for service therein, and to induce said persons liable for military and naval service of the United States under the provisions of the said Selective Training and Service Act as aforesaid to refuse to submit to registration and selection for such service aforesaid, as provided by the Act aforesaid, to the injury of the Service of the United States.

And this the defendants did do contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

[fol. 5] Count Two

And the grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that:

Elmer Hartzel,
Elmer William Soller, and
Newell Mecartney,

hereinafter called the defendants, whose full and true names other than as herein stated are unknown to the grand jurors, on or about, to wit, the 26th day of June, 1942, in the division and district aforesaid, and within the jurisdiction of this Court, the United States being then and there at war, did unlawfully, knowingly, wilfully, and feloniously cause, and attempt to cause, insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States, by wilfully preparing and causing to be prepared at Chicago, Illinois, a certain document, writing and article, hereinafter set forth, and by wilfully publishing, circulating, distributing and disseminating, and causing the publication, distribution and dissemination of, said document, writing and article in Chicago, Illinois, and at other places throughout the United States, to and among persons who were then and there members of and in the military and naval forces of the United States, among whom were those persons who were then and there subject to the provisions of an Act of Congress entitled, "The Selective Training and Service Act of 1940," approved September 16, 1940, and Acts amendatory and supplemental thereto, which said certain document, writing and article was entitled: "The British: An Inferior Breed", which said cer-

tain document, writing and article is set forth and described in Count One of this indictment and is incorporated by reference herein and made a part of this count as if it were set forth fully herein; that the defendants, and each of them, then and there well knew said document, writing and article was calculated and intended by the defendants to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States, all of which the said defendants did do, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

[fol. 6] Count Three

And the grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that

Elmer Hartzel,
Elmer William Soller, and
Newell Mecartney,

hereinafter called the defendants, whose full and true names other than as herein stated are unknown to the grand jurors, on or about, to wit, the 26th day of June, 1942, in the division and district aforesaid, and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly, and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, the United States being then and there at war, by wilfully preparing and causing to be prepared at Chicago, Illinois, a certain document, writing and article, hereinafter set forth, and by wilfully publishing, circulating, distributing and disseminating, and causing the publication, distribution and dissemination of, said document, writing and article in Chicago, Illinois, and at other places throughout the United States, to and among a large number of persons who were then and there available and eligible for recruiting and enlistment in the military and naval forces of the United States, as well as persons who were then and there liable for military and naval service of the United States under the provisions of an Act of Congress entitled, "The Selective Training and Service Act of 1940", approved September 16, 1940, and Acts amendatory and supplemental thereto, which said certain document, writing

and article was entitled, "The Jew Makes a Sacrifice: The Forthcoming Collapse of America", and was and is in words and tenor as follows, to wit:

The Jew Makes a Sacrifice:

The Forthcoming Collapse of America

Our blood soaked boom of the first World War was followed by a speculative orgy, then collapse. A similar maladjustment now seeks an outlet in another blood soaked boom which will end as before. In all of this the Jew—oriental hyphenated American, propagandist for bloody Joe and the British (Jewish) empire—has been an eager participant. Indeed, like a snake forced from its nest, the slimy blood lust of the "holy people" now stands revealed [fol. 7] —for is it not evident that the Jew hates bloodshed only when his own skin is in danger?

Let us consider briefly some of his characteristics.

The mentality of the Jew was exemplified recently by Leon Henderson when he wrote that "in 1942 as our contribution in the way of the merchandise of death, we are prepared to deliver a greater quantity of goods than this entire nation had to keep it alive in 1932". The Jew, in fact, makes his way among those with whom he lives by boring from within—by aggression concealed under holiness and hatred of force. When cornered he makes loud outcrys about the guilt of others who "persecute" him.

He does not engage in many occupations such as that of farmer, sailor, mechanic, necessary for the support of a state; he must, therefore, live among other peoples to prevent his own collapse. Since the weight of the community in which he lives does not rest upon him, his position as a specialized group is unstable: he oscillates back and forth, reflecting as he does so fragments of what he considers the world to be, through all of which runs a thread of egoism which portrays him as a grand parasitic ru'er.

He moves into a community with the idea of retaining his identity while at the same time reducing the disparity between himself and others by lowering standards, as in business. He escapes or is unfitted for many kinds of indispensable work, but makes a loud outcry about persecution when vents for his racialism are interfered with. As he lays concealed or slithers around within "democracy", part of his technique is to stress the need for tolerance,

particularly so if, as in Germany, he is caught at his unclean work.

As a parasite he is sensitive to trends: he feels influence quickly which effect his welfare. Associated with his intrusion into the privacy of others in the interests of his own preservation is a fear of isolation. Connected with his frequent need for overcoming disgust for his person is an emphasis on money, wherewith he buys his way. Among related peoples—Turks, Arabians—he does not make much headway.

The Jew God is used for purposes of the greatest of all idolatries—self Worship and survival. For if a people believe they are "chosen" almost anything they do is regarded as right if it preserves them: God is used to get beyond good and evil. Note, for instance, the two sides of [fol. 8] the Bible—the first teaching vengeance, the second meekness. A vast scope is therewith obtained for emphasizing the side suited to his (or your) needs, that is, God becomes a two faced instrument of torture—a bone crusher for use by the cunning. Today, in fact, almost any crime may be committed in his name in connection with fine words such as "freedom". How else justify blood soaked booms; attempts to starve Europe by blockade; an alliance with bloody Joe; and the massing of enormous quantities of mefi and materials with which to "crush" the Germans—except by offsetting the degeneracy of such acts by declaring them to be dictated by the "spirit".

The oriental Japanese struck at Port Arthur, in 1904, and at Pearl Harbor while negotiating. The Jew does not have their manfulness for open warfare, but he will—while conserving his own blood—eventually strike those with whom he lives in the back. He is now infiltrating into Government jobs under cover of "no race prejudice". He is, in fact, "dying" for the coming of bolshevism by making ready for your collapse. After many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest.

Are you not weary of the observation that the international parasite survives to see nations come and go? Distinguish then you must between white and yellow races or accept the slaughter of your sons by internal revolution or war abroad. Crush my enemies he screams! But there can be no further appeasement of his blood lust: no peace until

the slaughter he brings to others returns unto himself. He must be eliminated as an active element in the community.

* * * * * * *

which said document, writing and article, as the defendants, and each of them, then and there well knew, was calculated and intended by the said defendants to induce said persons available and eligible for recruiting and enlistment in the military and naval forces of the United States as aforesaid, to fail and refuse to enlist for service therein, and to induce said persons liable for military and naval service of the United States under the provisions of the said Selective Training and Service Act as aforesaid to refuse to submit to registration and selection for such service aforesaid, as provided by the Act aforesaid, to the injury of the service of the United States.

[fol. 9] And this the defendants did do contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Four

And the grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that

Elmer Hartzel,
Elmer William Soller, and
Newell Mecartney,

hereinafter called the defendants, whose full and true names other than as herein stated are unknown to the grand jurors, on or about, to wit, the 26th day of June, 1942, in the division and district aforesaid, and within the jurisdiction of this Court, the United States being then and there at war, did unlawfully, knowingly, wilfully, and feloniously cause, and attempt to cause, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States, by wilfully preparing and causing to be prepared at Chicago, Illinois, a certain document, writing and article, hereinafter set forth, and by wilfully publishing, circulating, distributing and disseminating, and causing the publication, distribution and dissemination of, said document, writing and article in Chicago, Illinois, and at other places throughout the United States, to and among persons who were then and there

members of and in the military and naval forces of the United States, among whom were those persons who were then and there subject to the provisions of an Act of Congress entitled, "The Selective Training and Service Act of 1940", approved September 16, 1940, and Acts amendatory and supplemental thereto, which said certain document, writing and article was entitled, "The Jew Makes a Sacrifice; The Forthcoming Collapse of America", which said certain document, writing and article is set forth and described in Count Three of this Indictment and is incorporated by reference herein and made a part of this count as if it were set forth fully herein; that the defendants, and each of them, then and there well knew said document, writing and article was calculated and intended by the defendants to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States, all of which the said defendants did do, contrary to [fol. 10] the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Five

And the grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that

Elmer Hartzel,
Elmer William Soller, and
Newell Mecartney,

hereinafter called the defendants, whose full and true names other than as herein stated are unknown to the grand jurors, on or about, to wit, the 17th day of August, 1942, in the division and district aforesaid, and within the jurisdiction of this Court, did unlawfully, wilfully, knowingly, and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, the United States being then and there at war, by wilfully preparing and causing to be prepared at Chicago, Illinois, certain written statements, hereinafter set forth, and by wilfully publishing, circulating, distributing and disseminating, and causing the publication, distribution and disseminaton of, said written statements in Chicago, Illinois, and at other places throughout the United States, to and among a large number of persons who were then and there available and eligible

for recruiting and enlistment in the military and naval forces of the United States, as well as persons who were then and there liable for military and naval service of the United States under the provisions of an Act of Congress entitled, "The Selective Training and Service Act of 1940", approved September 16, 1940, and Acts amendatory and supplemental thereto, which said certain written statements are in words and tenor as follows, to wit:

> "Not long ago we 'saved ourselves' by a program of relief—from the enervating effects of which we were unable to rise by manful effort. From the accompanying decay an external enemy was needed upon which to fasten the blame. Uniting with the decaying carcass of the British empire and war against the Germans were taken as solutions to the problem: They serve as counterpoises to our internal breakdown."
>
> "* * * as the people of Europe slowly unite to repel invaders who mouth over phrases about peace, God and civilization, many are beginning to recoil with [fol. 11] horror from a proposed invasion of Americans who, as before would only accentuate world revolution."
>
> "America was betrayed. The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by:
>
> "A stench from rotting carcasses of those who would again invade Europe;
>
> "Starvation for millions of British who thought they could starve others;
>
> "Dissolution from an internal war of race against race;
>
> "Occupation by foreign troops until we are able to stand alone; * * *"

which said written statements, as the defendants, and each of them, then and there well knew, were calculated and intended by the said defendants to induce said persons available and eligible for recruting and enlistment in the military and naval forces of the United States as aforesaid, to fail and refuse to enlist for service therein, and to induce said persons liable for military and naval service of the United States under the provisions of the said Selective Training and Service Act as aforesaid to refuse to

submit to registration and selection for such service aforesaid, as provided by the Act aforesaid, to the injury of the service of the United States.

And this the defendants did do contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Six

And the grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that

Elmer Hartzel,
Elmer William Soller, and
Newell Mecartney,

hereinafter called the defendants, whose full and true names other than as herein stated are unknown to the grand jurors, on or about, to wit, the 17th day of August, 1942, in the division and district aforesaid, and within the jurisdiction of this Court, the United States being then and there at war, did unlawfully, knowingly, wilfully, and feloniously cause, and attempt to cause, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to the injury of the [fol. 12] service of the United States, by wilfully preparing and causing to be prepared at Chicago, Illinois, certain written statements, hereinafter set forth, and by wilfully publishing, circulating, distributing and disseminating, and causing the publication, distribution and dissemination of, said written statements in Chicago, Illinois, and at other places throughout the United States, to and among persons who were then and there members of and in the military and naval forces of the United States, among whom were those persons who were then and there subject to the provisions of an Act of Congress entitled, "The Selective Training and Service Act of 1940", approved September 16, 1940, and Acts amendatory and supplemental thereto, which said certain written statements are set forth and described in Count Five of this indictment and are incorporated by reference herein and made a part of this count as if they were set forth fully herein; that the defendants, and each of them, then and there well knew said written statements were calculated and intended by the defendants to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, to the injury

of the service of the United States, all of which the said defendants did do, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Seven

And the grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that

Elmer Hartzel,
Elmer William Soller, and
Newell Mecartney,

hereinafter called the defendants, whose full and true names other than as herein stated are unknown to the grand jurors, continuously, from December 8, 1941, up to the date of the return of this indictment, in the division and district aforesaid, and within the jurisdiction of this Court, the United States being then and there at war, unlawfully, wilfully, knowingly, and feloniously did conspire, combine, confederate, and agree together, and with each other, and with other persons to the grand jurors unknown, to violate the provisions of Section 33, Title 50, of the United States Code, that is to say, the defendants conspired to commit the following offenses:

[fol. 13] (a) The United States then being at war, wilfully to cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States, by preparing, publishing, circulating, distributing and disseminating, and causing to be prepared, published, circulated, distributed and disseminated, in the Northern District of Illinois, and elsewhere throughout the United States, various documents, writings and articles, which said documents, writings and articles contained statements which would be and were calculated and intended by the defendants, and each of them, to cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States;

(b) The United States being at war, wilfully obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, by preparing, publishing, circulating, distributing and disseminating,

and causing to be prepared, published, circulated, distributed and disseminated at Chicago, Illinois, and at other places throughout the United States, various documents, writings and articles, which said documents, writings and articles contained statements which would be and were calculated and intended by the defendants, and each of them, to induce persons available and eligible for recruiting and enlistment in the military and naval forces of the United States to fail and refuse to enlist for service therein, and to induce persons who were and would be liable for military and naval service of the United States, under the provisions of an Act of Congress entitled, "The Selective Training and Service Act of 1940", approved September 16, 1940, and Acts amendatory and supplemental thereto, to refuse to submit to registration and selection for such service, as provided by the Act aforesaid, to the injury of the service of the United States.

And in order to effectuate and further the object of the conspiracy, the defendants, and each of them, did do, among other things, the following overt acts:

1. The defendants, and each of them, on or about June 26, 1942, in the City of Chicago, in the Northern District of Illinois, did prepare, publish, circulate, distribute and disseminate, and cause to be prepared, published, circulated, distributed and *and* disseminated, an article entitled, "The British: An Inferior Breed."

[fol. 14] 2. The defendants, and each of them, on or about June 26, 1942, in the City of Chicago, in the Northern District of Illinois, did prepare, publish, circulate, distribute and disseminate, and cause to be prepared, published, circulated, distributed and disseminated, an article entitled, "The Jew Makes a Sacrifice: The Forthcoming Collapse of America."

3. The defendants, and each of them, on or about August 17, 1942, in the City of Chicago, in the Northern District of Illinois, did prepare, publish, circulate, distribute and disseminate, and cause to be prepared, published, circulated, distributed and disseminated, certain written statements more fully set forth and described in Count Five of this indictment.

4. That during the month of May, 1942, at Chicago, Illinois, in the Northern District of Illinois, the defendant,

Newell Mecartney, did read and approve the articles entitled, "The British: An Inferior Breed" and "The Jew Makes a Sacrifice: The Forthcoming Collapse of America."

5. That on or about August 9, 1942, in the office of the defendant, Newell Mecartney, at 800 West North Avenue, Chicago, Illinois, the defendant, Elmer William Soller, gave a copy of certain written statements more fully set forth and described in Count Five of this indictment to the defendant, Newell Mecartney, for his approval.

6. That on or about August 9, 1942, at Chicago, Illinois, the defendant, Newell Mecartney, did read and approve certain written statements more fully set forth and described in Count Five of this indictment.

7. That on or about April 15, 1942, the defendant, Newell Mecartney, met and conferred with the defendant, Elmer Hartzel, in the office of the defendant, Newell Mecartney, at 800 West North Avenue, Chicago, Illinois.

8. That on or about August 9, 1942, the defendant, Elmer William Soller, met the defendant, Elmer Hartzel, on the southwest corner of Randolph and Michigan Avenue, in the City of Chicago, Illinois, and delivered to the defendant, Elmer Hartzel, approximately 300 copies of certain written statements more fully set forth and described in Count Five of this indictment.

9. That on or about April 15, 1942, the defendant, Elmer William Soller, had a conversation with the defendant, Newell Mecartney, at 800 West North Avenue, Chicago, Illinois.

[fol. 15] 10. That on or about May 15, 1942, the defendant, Elmer William Soller, had a conversation with the defendant, Newell Mecartney, at 800 West North Avenue, Chicago, Illinois.

11. That on or about August 9, 1942, the defendant, Elmer William Soller had a conversation with the defendant, Newell Mecartney, at 800 West North Avenue, Chicago, Illinois;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. Albert Woll, *United States Attorney.*

(Cover)

No. 33721

United States District Court, Northern District of Illinois, Eastern Division

The United States of America

vs.

Elmer Hartzel, Elmer William Soller, and Newell Mecartney

Indictment

Vio. Sections 33 and 34, Title 50, United States Code (Wilfully causing and attempting to cause the insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and wilfully obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, and conspiring so to do.)

A true bill.

Albert H. Rieckman, Foreman.

Filed in open court this 18th day of December, A. D. 1942.

Roy H. Johnson, Clerk. —— ——.

Bail, $——.

[fol. 16] In the District Court of the United States

* * * (Caption—33721) * * *

Arraignment—Dec. 28, 1942

This day comes the United States by the United States Attorney come also the defendants Elmer Hartzel, Elmer William Soller and Newell Mecartney in their own proper persons and being now arraigned upon the indictment filed herein against them each defendant pleads not guilty thereto and it is

Ordered that this cause be and it is hereby set for trial on January 4, A. D. 1943 and it is

Further Ordered that the bond of each defendant be and it is hereby reduced to the sum of Three Thousand ($3,000) Dollars.

* * * * * * *

Appearances of counsel omitted in printing.

* * * * * * *

[fol. 17] In the District Court of the United States

* * * (Caption—33721) * * *

Motion for Directed Verdict—Entered Jan. 8, 1942

This day comes the United States by the United States Attorney come also the defendants Elmer Hartzel, Elmer William Zoller and Newell Mecartney in their own proper persons and by their counsel come also the Jury and alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause and trial of said cause proceeds and thereupon at the close of the Government's evidence the defendant Elmer Hartzel by his counsel enters herein his motion for a directed verdict which motion is hereby overruled to which ruling of the Court the defendant duly excepts and during the examination of witnesses on behalf of defendants the hour of adjournment having arrived it is

Ordered that this cause be and the same is hereby continued to January 9, A. D. 1943 at 10:15 o'clock A. M. for further trial.

[fol. 18] In United States District Court

* * * * * * *

Bill of Exceptions—Filed May 27, 1943

Be it remembered that heretofore on to-wit: the 4th day of January, A. D. 1943, this case came on for hearing before the Honorable William H. Holly, one of the Judges of said Court, whereupon the following proceedings were had and evidence adduced on the trial of the above entitled cause.

Present: Mr. J. Albert Woll, United States Attorney, by Mr. William J. Connor, First Assistant United States Attorney, and Mr. John J. Kelly, Jr., Assistant United States Attorney, Appearing on behalf of the Government;

Mr. Benedict J. Short and Mr. Ode L. Rankin, Appearing on behalf of Defendant, Elmer Hartzell; Mr. William J. Powers, Appearing on behalf of Defendant, Elmer William Soller.

Whereupon, the Government, to maintain the issues on its behalf, introduced the following evidence.

The several witnesses being first duly sworn, testified as follows:

NICHOLAS JAMES ANTHONY, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is the Assistant to the Editor of the Infantry Journal, a service publication; that he is 35 years of age and has registered under the Selective training and Service Act; that his immediate superior is Lieut. Col. Joseph I. Greene of the United States Army; that on June 28, 1942, the United States Infantry Association received through the mails, two articles entitled, "The British: An Inferior Breed" and "The Jew Makes a Sacrifice: The Forthcoming Collapse of America" (Govt. Ex. 2 and 3); that he showed the two articles to Major John Ulmer, United States Army, [fol. 19] and then placed them on Lieut. Col. Greene's desk, whose duty it is, as Secretary of the U. S. Infantry Association, to examine all incoming mail; that Lieut. Col. Greene, after reading the articles, decide[d] the articles were scurrilous and seditious and ordered Anthony to send both of these articles to the F. B. I., which was done; that on August 16, 1942, the U. S. Infantry Association received through the mail an article entitled, "The Diseased Spinal Cord" (Govt. Ex. 5), which Anthony showed to Major Ulmer and Lieut. Col. Greene, and on their instructions Anthony sent the article to the F. B. I.

EDNA ADKINS, called as a witness on behalf of the Government, having been duly sworn, testified that:

She is Secretary of General H. H. Arnold, Commanding General of the United States Army Air Forces, War Department, Washington, D. C.; that anonymous articles entitled, "The British: An Inferior Breed" and "The Jew

makes a Sacrifice: The Forthcoming Collapse of America" (Gov. Ex. 7 and 8), enclosed in an envelope (Gov. Ex. 6) addressed to Major General H. H. Arnold, on June 30, 1942, came across her desk with the incoming mail; that she showed the articles to General Arnold who read them and signed a memorandum, directing that said articles be referred to the Federal Bureau of Investigation, and she mailed the articles and General Arnold's memorandum to the Federal Bureau of Investigation.

JOSEPH HUCKINGS, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is a Lieutenant Colonel on the General Staff Corp, United States Army, stationed at San Antonio, Texas; that sometime during the months of June, July or August, 1942, he received two documents (Govt. Ex. 9-A and 9-B) enclosed in an envelope addressed to Colonel Hastings (Govt. Ex. 9); that the documents were respectively entitled, "The Jew Makes a Sacrifice: The Forthcoming Collapse of America" and "The British: An Inferior Breed"; that they came into his hands in his capacity as Executive Officer to the Chief of the Military Intelligence Division; that he read them; that he showed them to his [fol. 20] immediate superior, Colonel A. W. Roffee, who read them; that he then notified the local office of the Federal Bureau of Investigation, San Antonio, Texas, that he had some documents that might be of interest to them and that he turned these documents over to Agent Holloman of the Federal Bureau of Investigation at San Antonio, Texas.

FRANKLYN BLISS SNYDER, called as a witness on behalf of the Government, having been duly sworn, testified that:

For the past three years he has been President of Northwestern University; that he is 58 years of age and is registered under the Selective Service and Training Act; that in the late spring or early summer of 1942 he received through the mail, two documents (Govt. Ex. 11 and 12), respectively, entitled, "The British: An Inferior Breed" and "The Jew Makes a Sacrifice"; that he looked at them and transmitted them by personal letter (Govt. Ex. 10) to the Federal Bureau of Investigation.

CLAUDE V. CAPERS, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is employed by the American Newspaper Publishers Association; that either in June, July or August of 1942, he, in company with two other employees of the Association, George N. Dale and E. F. Burpee, read Govt. Ex. 13, entitled, "The British: An Inferior Breed", which was on a desk in the office of the Association, located at 360 North Michigan Avenue, Chicago.

GWENDOLYN L. CATTORINI, called as a witness on behalf of the Government, having been duly sworn, testified that:

She is employed by the American Newspaper Publishers Association as secretary to Mr. Dale; that she read Govt. Exs. 13 and 14, entitled, respectively, "The British: An Inferior Breed" and "The Jew Makes a Sacrifice"; that Mr. Dale dictated a letter to Mr. J. Edgar Hoover, F. B. I., Washington, D. C., transmitting these documents; that she [fol. 21] transcribed Mr. Dale's letter (Govt. Ex. 14-A), enclosed the documents, and personally mailed the letter, with enclosures, to Mr. Hoover.

RALPH HENRY WINSLOW, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is the Director of the Club Service Division of the Kiwanis International; that Govt. Exs. 17-A, 17-B, and 17-C, entitled, respectively, "The Jew Makes a Sacrifice", "The Diseased Spinal Cord", and "The British: An Inferior Breed", were received through the regular mail addressed to the Kiwanis International; that he read these exhibits and decided that they should be sent to the F. B. I. because he recognized the possible danger of them; that he is 27 years of age and is registered under the Selective Service and Training Act.

RONALD BARLOW, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is employed as a clerk in the offices of the Lions International; that he is 20 years of age and is registered under the Selective Service and Training Act; that his duty is to open the incoming mail addressed to Lions International; that in June of 1942, while so employed as a clerk,

he opened an envelope addressed to the Lions International, containing a document entitled, "The British: An Inferior Breed"; that he read the document and then turned it over to one of the executives in the office.

ARTHUR ROBINSON, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is employed as Assistant Treasurer of the Lions International, Chicago; that he is 33 years of age and is registered under the Selective Service and Training Act; that in August of 1942 he read in his office the pamphlet entitled, "The Jew Makes a Sacrifice"; that after reading the document he instructed that it be sent to the Federal Bureau of Investigation.

[fol. 22] ROBERT SCHMIDT, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is employed by the Air Line Pilots Association; that he is 29 years of age and is registered under the Selective Service and Training Act; that he received through the mails, in June of 1942, an envelope addressed to the Air Line Pilots Association which contained pamphlets entitled, "The British: An Inferior Breed" and "The Jew Makes a Sacrifice"; that after reading these pamphlets he transmitted them through the mails to the Federal Bureau of Investigation; that in August of 1942 he received through the mails a pamphlet entitled, "The Diseased Spinal Cord" and after reading this pamphlet he sent it to the Federal Bureau of Investigation.

WILLIAM E. KEITH, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is the Assistant Department Adjutant, American Legion, Department of Illinois; that he is 44 years of age and is registered under the Selective Service and Training Act; that as a representative of the Department Commander of the American Legion he received through the mails the pamphlets entitled, "The Jew Makes a Sacrifice" and "The British: An Inferior Breed"; that he read these pamphlets and then sent them to the Federal Bureau of Investigation; that in August, 1942, he received through the mails an article entitled "The Diseased Spinal Cord"; that after reading this article he likewise sent it to the Federal Bureau of Investigation.

O. B. PETERSON, called as a witness on behalf of the Government, having been duly sworn, testified that:

He is the Secretary of the Kiwanis International, with offices in Chicago; that he is 43 years of age and is registered under the Selective Service and Training Act; that in August of 1942 he was shown in his office a copy of a pamphlet entitled, "The Diseased Spinal Cord", which he read.

[fols. 23-27] JOHN T. BINKLEY, JR., a witness for the Government, testified as follows:

Direct examination.

By Mr. Connors:

My name is John T. Binkley, Jr. I am a Special Agent, Federal Bureau of Investigation, United States Department of Justice, in which occupation I have been engaged for a year and ten months. During June, July and August, 1942, I was assigned to the Chicago Field Office and to investigate the facts in the case here on trial.

I have seen the articles entitled: "The British An Inferior Breed", marked Government's Exhibit 9-B; "The Jew Makes A Sacrifice: The Forthcoming Collapse of America", marked Government's Exhibit 9-A; and "A Diseased Spinal Cord", marked Government's Exhibit 5, many times.

In the months of June, July, August and September, 1942, we received several hundred copies of these articles, forwarded through the mails from various recipients.

* * * * * * *

[fol. 28] On September 15, 1942, I came to the United States Marshal's office in this building, and there had a conversation with a prisoner by the name of Lee Bonner. No one else was present during that conversation. After the conversation with Lee Bonner I went to the home of Elmer Hartzell and looked under the bath tub and found a paper bag stuffed with paper under the bath tub in a bath room in his home. In that paper bag I found 188 business size envelopes addressed on a typewriter, all of them bearing the addresses of the individuals who have previously testified in this case, and of the organizations that turned these pamphlets in to us. I also found three copies of

"The British An Inferior Breed", and several copies of "The Jew Makes a Sacrifice: The Forthcoming Collapse of America" stuffed in this paper bag.

Government's Exhibit 35-A, entitled: "The Jew Makes a Sacrifice: The Forthcoming Collapse of America", and Government's Exhibit 35, entitled: "The British An Inferior Breed", are two copies of the originals I found [fols. 29-31] under the bath tub in the same paper bag with the envelopes I spoke of.

This search was made at a rooming house at 21 East 110th Street belonging to Mr. and Mrs. Wintercorn. When I arrived there, the only persons in the house were Mrs. Wintercorn, her young son, Lawrence Wintercorn, and Mrs. Hartzell, wife of the defendent Hartzell. Mrs. Hartzell was not in evidence at the time I rang the bell. The young son answered the door. I observed that Mrs. Wintercorn was ill in bed. I asked Lawrence Wintercorn to accompany me while I looked under the bathtub. He was present at the time I found the pamphlets and envelopes under the bath tub. The bathroom was next door to the room occupied by Mr. and Mrs. Hartzell. The Hartzells lived in a rear room on the second floor. The documents were found in a bath room, stuffed under the bathtub, next door to the room occupied by Mr. and Mrs. Hartzell. I had a conversation with Mrs. Hartzell, and then went to the bath room and found these documents.

Government's Exhibit 36, "The British An Inferior Breed" and Government's Exhibit 37, "The Jew Makes a Sacrifice: The Forthcoming Collapse of America," are copies of pamphlets received in our office from various complaints, that I showed to the defendant, Mr. Soller, while I was questioning him and I asked him if these were copies that he had run off on his mimeograph machine, and he identified them as such copies and placed his initials at the bottom.

* * * * * * *

[fol. 32] *Cross-examination.*

By Mr. Short:

I have seen Hartzel before at the office of the F. B. I. in Chicago. There are 16 or 17 rooms up there. Four of them [fol. 33] are called detention rooms. At that time I think there were only three. The doors are wired like the mesh

of chicken wire, but stronger. The floor we were on is the 19th. Most of the rooms there are office rooms. We have stenographers there. We have no court reporters. The stenographers take statements for us.

I first saw Hartzel on Sunday, September 6, when he was brought into the office. He was in the agents' conference room. There are two large rooms as big as this room that are the conference rooms; and the agents have their desks in there. I could not say how many. They change agents so frequently. I do not know how long the little rooms with the wire doors have been called detention rooms, or who calls them that. There are cots in those rooms. They are pretty good beds with springs on them. There are chairs in the detention rooms. I have never heard those rooms called cells. There is wire on the windows and sometimes there is a padlock on the door.

I had a talk with Mr. Hartzel one evening for approximately five minutes. There were others present. They were not taking notes. I asked Hartzel questions about this case. I did not tell him who I was. He saw me before when we were taking his fingerprints and photograph. That was out in the agents' room. I never was out to the County Jail to see him. I was told he was in the County Jail. I did not have any one go out to the County Jail to see him. I did not receive any message from him while he was in the County Jail. I never saw Hartzell on Chicago Avenue. I was out to his home twice; his wife was there on both occasions. Prior to going out to his home the individual in the County Jail told me where Hartzel lived. That man was Lee Bonner. I did not know what his business was. I do not know what charge there was against him. He was a prisoner in the County Jail. I did not give him any money. Nobody in our office gave him a cent. Bonner did not go with me to the Hartzel home. Hartzel was then in the County Jail. I did not call him up. I saw Mrs. Hartzel when I got down there. I did not call her up before I started down. I believe I went out to the Hartzel home on the same day I talked to Bonner. That was about noon. I met Lawrence Wintercorn out there, who is the son of the woman who owns the building. I met Bonner in the Marshal's office. I did not meet him at the Hartzel home. I [fols. 34-41] went out to the Hartzell home alone. Bonner did not go there at any time. He was in the Marshal's office

when I left him. I was at the Hartzel home about thirty minutes. Mrs. Hartzel was there all the time. The Hartzels' had a one room apartment and in the hallway next to their room was this bathroom. There was no other bathroom on that floor that I know of. Lawrence Wintercorn went into the bathroom with me. He is the son of the woman who owns the house and the bathroom.

I was in the bathroom about five or ten minutes. I was looking for this so called literature that Bonner told me was under the bathtub. Mrs. Hartzel had already signed a waiver of search. Another agent had been sent out there by Mr. Belmont. The waiver was at the office; I had seen it. I introduced myself to Mrs. Hartzel and told her I was one of the F. B. I. agents. We have a form of waiver of search and seizure. We have them signed. I took the papers that I found there back to the office in a brown paper shopping bag. I did not take Mrs. Hartzel with me. I did not go out to the jail to see Hartzel, or notify him that I had taken the papers. I did not see Hartzel until after he was arraigned in the Commissioners' Court; not in this court.

I talked to Hartzel once in our office. That took about five minutes or less. I told Hartzel we had the goods on him. I have been with the F. B. I. since March 17, 1941. Prior to that I practiced law in Texas and New York City. I tried criminal cases in Texas. When I talked to Hartzel there were other agents around, at least one, possibly two.

I was not present when Hartzel was arrested. I only talked to him once for four or five minutes. I did not ask him if he had ever been in trouble before.

The Court: The exhibits which are to be read say something about the defendant Hartzel. You will not consider this as any evidence against Hartzel, but only evidence against the person making the statements.

* * * * * * *

[fols. 42-44] Henry Krueger, Assistant Treasurer Lions Club; testified to receipt through mail of pamphlet: "Diseased Spinal Cord," and sending same to F. B. I.

* * * * * * *

[fol. 45] LAWRENCE WINTERCORN, a witness for the Government, testified as follows:

Direct examination.

By Mr. Connor:

My name is Lawrence Wintercorn; residence 21 West 110th Street. We have lived there for ten years. I recall special agent Binkley coming to our house on September 15, 1942, about two o'clock in the afternoon. He told me his name and that he was an agent of the F. B. I. He asked me to show him our bathroom upstairs. I showed the bathroom to him and he told me to go along to the bathroom with him. It was a private kitchen and bathroom; it is all private. I went along with him. He went into the bathroom; I was going to go downstairs, and he said, "I would like you to see this." Mr. Binkley looked under the bathtub and found a shopping bag full of leaflets. He brought them down to the kitchen. I saw him take them from under the bathtub and saw him take them out. I saw what was in the bag.

(Colloquy between Court and Counsel.)

Mr. Connor: Will counsel come up here?

Your Honor, we did want to introduce a few envelopes yesterday and they insist upon the 180.

The Court: Yes.

Mr. Connor: I have them here now and I am going to have them identified by this witness, the boy.

Mr. Short: What is your point?

Mr. Connor: Yesterday we wanted to introduce just a few envelopes.

Mr. Rankin: Yesterday you had a selected number in the Army Forces and one or two others, and we wanted the whole group together, instead of some specific selected ones.

Mr. Connor: Here is the whole group now.

Mr. Rankin: All right. All this boy knows is he saw a bunch of envelopes.

[fol. 46] The Court: I don't know what he knows. You can ask him.

The Witness: I know I saw a lot of envelopes there with the typewriter names on but I could not remember those

names. The envelopes were of this nature. I saw pamphlets in the package. I recall seeing Government's Exhibit 42, "The Blood Sacrifice." That was one of the pamphlets found in the bathroom under the bathtub.

Cross-examination.

By Mr. Short:

I will be fourteen years of age next week. I did not know Mr. Binkley's name but I would know him if I saw him. I had never seen him before that day that I remember. It was on a Tuesday that I saw him; it was about November. The first time I saw him was when he came to the door at 21 West 110th Street. He was out at our building about fifteen or twenty minutes. No one else was with him. I am pretty sure he came there in a car.

The bathroom I spoke of is on the second floor. It is private with a kitchenette. There are five rooms on that floor, and that is the only bathroom on that floor. There is a bathroom and a living room. Only two people live on that floor. Only two rooms are rented out. The others are bedrooms for our family. Our folks live on the first and second floors. The bathroom and kitchenette are on the second floor. The bathroom is next to the kitchenette. I had not been in that bathroom before that day. That is private. Mr. Binkley must have come about two o'clock in the afternoon. My mother was there at that time. She was in bed all that day. When Mr. Binkley went to the second floor I was the only one who went with him. Besides Mr. Binkley and myself, the lady was on the second floor. Mr. Binkley was in the bathroom about five or ten minutes. I did not go into that bathroom prior to that on that day. That is not a bathroom for our family. It was not locked with a key or anything. It was possible for any one to walk into the bathroom without a key. I went into the bathroom with Mr. Binkley; he asked me to go in with him. He told me he was going to use me as a witness in this case. He has been out there since to see me. I think he was out there once only, when he brought some kind of suit-[fol. 47] cases back with the lady. He did not take suitcases away with him on the day he took the envelopes. He came back about two or three weeks later. I had not seen him between the first day he was there and the day he returned

with the suitcases. I had not been to his office. I saw him again on the second floor here. I had never seen him on the two occasions mentioned. I saw Mr. Binkley yesterday. I got a card telling me to come down. I was told I was not needed yesterday and that I was to come down here again today. The card was from the F. B. I.; I had to bring it with me and they punched it. The man downstairs on the second floor punched my card three times and gave my card back to me. I forgot to bring it today. First, I went to have the card punched and then I went to see Mr. Connor. I only said hello to Mr. Binkley. I did not talk this matter over with him. Nothing was said about this case. I told Mr. Connor about what I have told here. I went over it with him. Mr. Binkley was there at the time. Mr. Binkley had told me to remember what happened in case he needed me as a witness; when we went over it yesterday he only corrected me as to the date. I think he said it was the 15th because I knew it was a Tuesday. He looked it up on the calendar and told me it was the 15th, because he knew the week, and I knew it was a Tuesday. We agreed on that date. I was with him about ten minutes when I had that talk. I don't know what was in the suitcases that he brought back. I am quite sure it was books. I remember I helped him with one up to the room. I did not open them and look into them, and he did not. Nothing was said about where they came from. This is my first experience as a witness and the first time I ever met an F. B. I. man.

Redirect examination:

By Mr. Connor:

I received a card to appear as a witness, and I had that card punched. The card told me to appear on a certain date. That is the card I referred to in my examination.

Mr. and Mrs. Hartzel lived on the second floor. I know Mr. Hartzel; I see him in the courtroom. (Witness identifies defendant Hartzel.)

[fol. 48] LEE BONNER, a witness for the Government, testified as follows:

Direct examination.

By Mr. Connor:

My name is Lee Bonner, now residing in a federal correctional institution at Sandstone, Minnesota. I was in Chicago during the month of September, 1942, residing at the Cook County Jail. I know the defendant Hartzel; I see him in the courtroom. (Witness identifies defendant Hartzel.)

I had a conversation with Mr. Hartzel in the County Jail. He and I were the only ones present. The conversation took place around September 12th or 13th, 1942. Mr. Hartzel said that the Government had not found everything that they were looking for and that if he could find a person that he could trust well enough to get rid of this particular item it would be well worth his time, the payment of a few dollars, the amount was not mentioned. I asked Mr. Hartzel what he had reference to and he told me that the Government was looking for a mailing list with the names of twenty-five members in the army and navy, the armed forces, and said if he could find some one who would destroy it before the Government got it, he would be glad to pay them for it. I told him that if I were released I would be glad to go out and get rid of it for him.

On September 15, 1942, I was in the United States Marshal's office in this building. I know Mr. Binkley. I see him in the courtroom. I had a conversation with Mr. Binkley on that date. I had another conversation on the 13th with Mr. Hartzel along the same lines. There was a note given to me and I asked Mr. Hartzel if I were to go out to his home how would I get in, and he said that wouldn't make any difference, he would fix me up with a note to his wife, which he prepared, addressed to Mrs. Mary Hartzel, 21 W. 110th Street, saying in substance, "This will introduce Lee Bonner. Please allow him to go into our bathroom and take the contents of the brown shopping bag underneath the bathtub"; the note was signed "Elmer Hartzel."

Cross-examination.

By Mr. Short:

My business is that of a dining car steward with the Illinois Central Railroad. I am not a steward now. I am an inmate of a Federal Institution at the present time. [fol. 49] I will be out of that institution in fifty-one days. I was sent there for the impersonation of a federal officer. I was in the County Jail awaiting trial upon that charge. I have been in jail about four times; twice for impersonation, once for obtaining money through trickery, and once I was picked up on suspicion and released. That was on the ground of vagrancy, I guess. I have been engaged in criminal offenses about two years. Before that I was a dining car steward, for about six or seven years. I was born in St. Louis, Missouri. I have been married for thirteen years. My wife is living; I am not living with her when I am out of jail. I have been in four different jails. I did not have to tell the F.B.I. man that. He knew; he had my record. He did not say anything about there being any doubt in the minds of the court or jury about the truth of my statements. I first met the F.B.I. man in the Marshal's office on September 15th. I was in the Marshal's office for a hearing on my trial. My case was in this building, in this court before Judge Holly. I did not speak to the Marshal about this when I was in his office. I spoke to the F.B.I. man. I sent for the F.B.I. man. I told them at the gate that leads to the bullpen in the Marshal's office, that I wanted to see the F.B.I. agent. That was in this building. I had not seen the F.B.I. man or anyone else at the County Jail.

I met Hartzel in the County Jail about September 12. I had known Hartzel about twelve hours before he told me about this matter. Hartzel did not ask me what I was being held for. He just told me he would like to give me a little money. He brought up all of the conversation. Hartzel knew that I had been in jail several times. I was the only one at that time that he could believe; I was the only one he thought could get out there. I did not tell Mr. Hartzel anything about my past. I do not know where my wife is working now—on Wentworth Avenue. I have seen my wife since being confined in this last institution, which is at Sandstone, Minnesota. I have never served time in any penitentiary, just in county jails,

institutions of that kind. I was in the County Jail in Chicago a little better than a month. In my education I finished high school. I belong to the Lutheran Church; I attend it.

I first got into crime in 1927, more than fifteen years ago. I saw Mr. Hartzel after I talked to the F.B.I. man at the County Jail. I did not tell him what had been [fol. 50] done. I saw him in the same tier. I talked to him frequently in that tier during the eveningtime. Hartzel gave me money on several occasions. It wasn't much money; just a quarter or fifteen cents at a time. I never offered to pay it back to him.

I did not know I was going to be a witness until they sent a writ up after me. I never said anything to Mr. Hartzel about going to his home and doing what I did do. I never said a word about it. I was in trouble in Memphis. I served time in the workhouse there. I had been out of jail this time for about eight years. Prior to that it was about four years. My time was not up at the time I was expecting to go out of jail to go to the Hartzel home. It was at the time of my trial. I was in for impersonation and one of the assistants of the United States Attorney was trying to get me into the army at the time. I came over for the hearing before Commissioner Walker to see whether or not I was going into the army. I had been in the army when I was fifteen years old and got discharged before I was sixteen. I was too young to be in the army. I was supposed to be allowed out on the day I came for the hearing, and when the Government could not get me in the army they had to prosecute me on the impersonation charge.

I did not go out to the Hartzel home. I would have gone out there but I did not get out of my imprisonment. My agreement with Hartzel was to go out there if I got out. He knew I had a hearing here at that time and I told him if I got out I would go to his home. I came to be a witness for the F.B.I. in this way. I just got to thinking about it; I will put it this way: Sedition is next to Treason; I had a mother, a wife and a family. That is what made me a witness for the F.B.I. I would not say that I turned hero right away. Sedition is anything that breaks down the morale of the armed forces or any of us. I did not know this case. I knew he was charged with sedition and that was enough for me. I understand

he is charged with sedition; I saw it in the newspapers. Maybe I am not reformed; maybe I am just an American.

I do not know what became of the Hartzel note. It was misplaced. I don't know what I did with it. When I went to get it I did not have it. I did not give it to the F.B.I. I put it under my mattress in the County Jail and when I went to get it, it was gone. I believe I talked to the F.B.I. man before my hearing. There was no ar-[fol. 51] rangement made with the F.B.I. if I furnished them with information. When I talked to the F.B.I. man I did it because of this patriotic spirit that came over me. I did not expect to get any money from Mr. Hartzel after that, and I did not expect to have the F.B.I. do me any favors. I did not ask for any. I do not know of any other reason for changing my mind but the spirit of loyalty to the country. I was turned down by the army. I do not know if the army knew about this story when they turned me down.

JOHN T. BINKLEY, JR., recalled as a witness for the Government, testified as follows:

Direct examination.

By Mr. Connor:

My name is John T Binkley, Jr. I am the same person who testified here. The batch of envelopes marked Government's Exhibit 41 are the envelopes that I found under the bathtub in the bathroom at 21 West 110th Street, Chicago. I have identified each of these envelopes with my signature and the date and file number on the corner of each envelope. (Witness examines envelopes.) Each of these envelopes is so identified. They were identified by me on the same day that I found them under the bathtub. I brought them directly to the Chicago field office and placed my initials and the date on each one. (Witness places an elastic round the envelopes.)

(Envelopes offered in evidence by the Government.)

Mr. Rankin: The materiality does not appear at this time. We object to that.

The Court: Overruled.

(Envelopes received in evidence and marked Government's Exhibit 41.)

JOSEPH F. CARROLL, a witness for the Government, testified as follows:

Direct examination.

By Mr. Kelly:

My name is Joseph F. Carroll, residence, Chicago, Illinois. I am a Special Agent of the Federal Bureau of Investigation, assigned to the Chicago office. I was assigned to that office during the month of September, 1942.

I know Elmer Hartzel; I see him in the courtroom. (Wit- [fol. 52] ness identifies the defendant Hartzel.) I saw the defendant Hartzel on September 9, 1942 in the Chicago office of the Federal Bureau of Investigation, and had a conversation with him at that time. Special Agent, George R. Johnson was present at that time. I asked Mr. Hartzel as to the date and place of his birth and he told me he was born in 1891 at Newcastle, Pennsylvania. He told me he attended grammar and high schools in the area of his birth and completed his education in 1909; that between 1909 and 1917 he held various occupations including one with a butter and egg concern.

Hartzel stated that in 1917 he enlisted with the United States Army and was assigned to the University of Pittsburgh Base Hospital Number 7, and that he saw service overseas with that unit; that he was discharged from the army in New Jersey after the war and between that time and 1923 he was employed in various occupations, one of which was with the Goodyear Tire & Rubber Company, and another as Sanitary Inspector with the City of Akron, Ohio; that during that period of time he attended the University of Akron, Ohio and graduated from there in 1923 with a Bachelor of Science Degree; that between the years 1923 and 1936 he attended the University of Chicago where he majored in Political Economy and related subjects; that between 1926 and 1930 he held various employments, the last of which was with an investment firm in Chicago in the capacity of business analyst; that he terminated his employment with that concern in 1930 because of the depression, and from then until 1937 he held a series of positions in different places including employment in Springfield, Illinois with the State Government and with a private firm in that locality; that in 1937 he began employment anew in

Chicago in a private capacity and held that employment until 1941 when he took employment with the United States Army Aircraft Division as a civilian employee and was assigned to duties at the Packard Motor Car Company in Detroit, Michigan; that he retained his position at that point until approximately November, 1941 when he was transferred as a civilian employee of the United States Army to the Buick Aviation Engine Plant at Melrose Park, Illinois, and remained at that place until July of this year when he was transferred to the Pullman Standard Car & Manufacturing Company on the south side of Chicago.

Hartzel stated that beginning in the year 1938 he began [fol. 53] to write articles. The first article he called to my attention was entitled: "T. V. Smith, Congressman-At-Large." The second one he mentioned was entitled: "The President's Illness." He stated that he wrote this last mentioned article about the first part of 1940; that he also wrote other articles variously entitled: "The Condition of Our Leader," "Roosevelt's Infantile Paralysis," "Revolution Will Come to America," and "Diseased Spinal Cord." Hartzel told me that he had had the articles, "T. V. Smith, Congressman-At-Large" and "Revolution Will Come to America" mimeographed by individuals on the south side of Chicago.

Hartzel stated that he knew Elmer Soller, and said that he met Soller in May, 1941 when he called at Soller's office. In reply to my question as to how he happened to call on Mr. Soller, he stated that prior to calling at Mr. Soller's office he called at the office of the German-American National Alliance in Chicago and asked that he be referred by them to some mimeograph operator in Chicago who might do some work for him. He said that he had been referred by someone in the office of the German-American National Alliance, to the office of Mr. Soller, and that he then called to see Mr. Soller at his office at 800 West North Avenue; that at that time he did not offer any work to Mr. Soller but had merely spoken to him; that it was not until several months later that he had referred any work to Mr. Soller, at which time he was in Detroit, Michigan, as a civilian employee of the United States Army assigned to the Packard Motor Car Company of that city; that he had telephoned to Mr. Soller to see if he was still in business be-

cause of the fact that time had elapsed since he had any contact with him.

Hartzel stated that pursuant to the telephone conversation he had mailed to Mr. Soller an original manuscript entitled: "The Blood Sacrifice" directing Mr. Soller to mimeograph for him six hundred copies of that original; that a few days later through the United States mails, the completed work came from Mr. Soller by American Railway Express, paying $10.00 and some odd cents for the package which had been sent to him collect; that about a month later, having made revisions in the original entitled: "The Blood Sacrifice," he mailed the revised manuscript to Mr. Soller; that he had made the revisions by longhand and had it rewritten by a stenographer in Detroit, and [fol. 54], then mailed the revised article still entitled "The Blood Sacrifice" to Mr. Soller with notations as to the desired number of copies and directions as to margin and space, and asked that four hundred additional copies of the revised article be mimeographed and sent to him; that a few days later the four hundred mimeographed copies were received by him through the mails; that shortly thereafter he was transferred back to Chicago to his position with the Buick Aviation Engine Plant in Melrose Park, Illinois; that he again went to see Mr. Soller but did not give him any work; that he went there to make certain that Mr. Soller was still in business; that a short time later he sent to Mr. Soller two manuscripts which he had himself prepared on a typewriter of his own, entitled, "The Jew Makes a Sacrifice: The Forthcoming Collapse of America" and "The British An Inferior Breed"; that he ordered six hundred copies of each of these articles to be mimeographed and returned to him; that approximately a month later he again sent work to Mr. Soller, this time sending an original manuscript entitled: "The Diseased Spinal Cord" and directed that six hundred copies be mimeographed and given to him.

Hartzel stated that he had folded these articles and inserted them in envelopes and mailed them. He told me that with respect to the originals entitled: "T. V. Smith, Congressman-At-Large" and "Revolution Will Come to America," some had been handprinted by him and others typed by an unknown source. With respect to all of the other articles he stated that the envelopes had been typewritten

by him; that after he had received the mimeographed copies from Mr. Soller of the article, "The Blood Sacrifice," he had submitted a mailing list to a stenographer in Detroit and had these typed from his mailing list and addressed to those persons to whom he desired to send these articles. With respect to the article, "The Blood Sacrifice" he stated that the envelopes were typed by the same stenographer in accordance with his mailing list. With respect to the articles entitled, "The Diseased Spinal Cord," "The British An Inferior Breed" and "The Jew Makes a Sacrifice: The Forthcoming Collapse of America," Hartzell stated that he himself had typed the envelopes containing these articles on a typewriter which he had subsequently acquired.

Mr. Hartzel stated that he did not have any assistance in the distribution of the articles through the mails; that he [fol. 55] had performed all of the manual labor connected therewith, and was solely responsible for the composition of the articles in the first instance.

I believe that is the gist of the conversation that I had with Mr. Hartzel on that date. That conversation was reduced to writing and a statement, as written up, was shown to Mr. Hartzel. (Statement of Hartzel, marked Government's Exhibit 43.)

I have seen Government's Exhibit 43 before. It is a statement which was given to me by Elmer Hartzel, signed by him in the Chicago office of the Federal Bureau of Investigation on September 9, 1942. The signature on the last page is that of Elmer Hartzel. He signed it in my presence. One of the signatures on the same page is that of myself; and the other is the signature of George R. Johnson, who was present during the time that conversation took place. The initials, E. H., in the lower right hand corner of each page are those of Mr. Hartzel. They were put on each page in my presence by Mr. Hartzel. Before he signed the document he read it through, and after reading it, in my presence he initialed the pages.

I know Agent Savage. I had a conversation with him about September, 1942, relative to certain property of Mr. Hartzel; I think it was on the morning of September 8th. Pursuant to that conversation I searched a trunk belonging to Mr. Hartzel, in the upper section of which trunk, in a removable tray, I found a one pound tin can bearing im-

printed on the cover the name "Bokar Coffee Supreme."

(Can marked Government's Exhibit 44.)

Government's Exhibit 44 is the can about which I just testified. At the time I found the can there was contained in it several folded manuscripts variously entitled, "Revolution Will Come to America," "Roosevelt's Illness," "Roosevelt's Infantile Paralysis," and "The Condition of Our Leader," all of these articles being mimeographed; in addition likewise in a folder, a rolled condition, were contained in this can two typewritten articles entitled, "The Jew Makes a Sacrifice: Forthcoming Collapse of America," and "The British an Inferior Breed." In addition to these articles there was also contained in this can likewise in folded condition six mimeographed sheets stapled together bearing the names and addresses of various labor unions throughout the United States.

(Document marked Government's Exhibit 45 for Identification.)

[fol. 56] The Witness: I have heretofore seen Government's Exhibit 45 for identification, being a pamphlet entitled, "Roosevelt's Illness." That document was found in Government's Exhibit 44. My initials appear on the reverse side of each page of the two page document. On the face of each page are the initials "E. H." Those are the initials of Elmer Hartzell and were initialed by him in my presence.

(Document marked Government's Exhibit 46 for Identification.)

I have heretofore seen Government's Exhibit 46 for identification, being a pamphlet entitled, "Roosevelt's Infantile Paralysis." It was one of the documents found in Government's Exhibit 44. My initials appear on that document in the upper right hand corner on the reverse side of each page. The initials "E. H.", being the initials of Elmer Hartzell, appear on the face of each page and were put there by Mr. Hartzell in my presence.

(Document marked Government's Exhibit 47 for Identification.)

Government's Exhibit 47 for identification is a pamphlet entitled "The Condition of Our Leader," and was found in Government's Exhibit 44. My initials appear thereon in

the upper right hand corner on the reverse side of each page. Mr. Hartzell's initials, "E. H." which he placed thereon in my presence appear on the face of the document.

(Document marked Government's Exhibits 48-A and 48-B for Identification.)

I have heretofore seen the last mentioned exhibits. I found them in Mr. Hartzell's trunk in a brown paper sack which was located close to the tin can containing the other documents I have referred to.

I took a specimen of Mr. Hartzell's handwriting on September 11, 1942.

(Document marked Government's Exhibit 49 for Identification.)

I have heretofore seen the last mentioned exhibit. It is not a sample of Mr. Hartzell's handwriting. This document is one of a series of a miscellaneous assortment of notes which were likewise contained in the brown paper sack in the upper section of the trunk belonging to Mr. Hartzell.

(Document marked Government's Exhibits 50-A, B and C for Identification.)

[fol. 57] I have heretofore seen Government's Exhibit 50-A, B and C for identification. They purport to be samples of Mr. Hartzell's handwriting. My initials appear upon those documents in the upper left hand portion of each sheet. They were given to me by Mr. Hartzell on September 11, 1942.

(Document marked Government's Exhibit 51 for Identification.)

I have heretofore seen the last mentioned exhibit which is a scrap of paper in a cellophane wrapper. I have seen that before. I saw it on September 10, 1942 in the office of the Chicago Field Division of the F. B. I. on the occasion of the search I made of a trunk belonging to Mr. Hartzell. This piece of paper was located in a brown paper sack which was located in turn in the upper section of Mr. Hartzell's trunk.

(Document marked Government's Exhibit 52 for Identification.)

I have heretofore seen said document which are scraps of paper contained in a cellophane wrapper. I saw them in the Chicago Field Division of the F. B. I. on September 10, 1942 contained in the said brown paper sack.

(Document marked Government's Exhibit 53 for Identification.)

I have heretofore seen Government's Exhibit 53 for identification, which is five scraps of paper. I saw them on September 10, 1942 in the office of the F. B. I. in said brown paper sack.

(Document marked Government's Exhibit 54 for Identification.)

I have heretofore seen Government's Exhibit 54 for identification, which purports to be numerous writings and scraps of paper. I saw them on September 10, 1942 in the Chicago office of the F. B. I. contained in a brown paper sack located in a trunk belonging to Mr. Hartzell.

(Document marked Government's Exhibit 55 for Identification.)

I saw Government's Exhibit 55 for identification on September 10, 1942, which is numerous scraps of paper, in the Chicago office of the F. B. I., contained in the said brown paper sack.

(Document marked Government's Exhibit 56 for Identification.)

Government's Exhibit 56 for identification is seven scraps of paper upon which appear some handwriting. I have [fol. 58] seen those before on September 10, 1942 in the Chicago office of the F. B. I. contained in said brown paper sack.

(Documents marked Government's Exhibits 57, 58 and 59 for Identification.)

I have seen said exhibits which are scraps of paper. I saw them at the same time and place as the other documents that were found in said sack.

(Document marked Government's Exhibit 60 for Identification.)

I have heretofore seen the last mentioned exhibit which is a pamphlet consisting of fifteen pages, entitled "Revolu-

tion Will Come to America," at the Chicago office of the F. B. I. It was contained in the coffee can marked Government's Exhibit 44.

(Document marked Goverument's Exhibit 61 for Identification.)

I have not heretofore seen that document which purports to be a pamphlet entitled "The Jew Makes a Sacrifice: The Forthcoming Collapse of America."

(Document marked Government's Exhibit 62 for Identification.)

I have heretofore seen Government's Exhibit 62 for identification which is the paper bag in which I found the other articles described. I saw it at the Chicago office of the F. B. I. on September 10, 1942.

(Document marked Government's Exhibit 63 for Identification.)

I have heretofore seen Government's Exhibit 63 for identification which purports to be a list of names entitled "The Congress of Industrial Organizations, 1106 Connecticut Avenue North West, Washington, D. C., dated January 22, 1941." I saw that in the Chicago office of the F. B. I. on September 10, 1942, contained in the coffee can. The initials in the lower right hand corner are those of Elmer Hartzell, put there in my presence.

(Document marked Government's Exhibit 64 for Identification.)

I have heretofore seen Government's Exhibit 64 for identification, being a pamphlet entitled "The British an Inferior Breed," consisting of one page. I saw that in the Chicago office of the F. B. I. on September 10, 1942. It was contained in the said coffee can.

(Document marked Government's Exhibit 65 for Identification.)

I have heretofore seen Government's Exhibit 65 for [fol. 59] identification, being an article entitled "The Jew Makes a Sacrifice: Forthcoming Collapse of America." I saw that at the Chicago office of the F. B. I. on September 10, 1942, contained in the said coffee can.

(Documents marked Government's Exhibits 65-A and 65-B for Identification.)

I have heretofore seen the last mentioned exhibits, consisting of three pages, which are pieces of paper upon which are some writings. I saw them on September 10, 1942 at the Chicago office of the F. B. I. contained in said coffee can.

(Documents marked Government's Exhibits 66 and 67 for Identification.)

I have heretofore seen Government's Exhibits 66 and 67. No. 66 purports to be a waiver of search dated September 6, 1942. I saw that on September 6, 1942 at the residence of Elmer Hartzell at 21 West 110th Street. The signature on the bottom is that of Elmer Hartzell. It was signed in my presence. The other signatures in the lower left hand corner are those of myself and of Special Agent Ralph Gregg, at that time assigned to the Chicago office. Mr. Hartzell signed in my presence.

Government's Exhibit 67, which purports to be a waiver of custody, I saw on September 6, 1942 in the Chicago office of the F. B. I. The signature at the bottom is that of Elmer Hartzell and was signed in my presence. The other signatures in the lower left hand corner are my own and that of A. H. Belmont, Special Agent assigned to the Chicago office.

Cross-examination.

By Mr. Powers:

I did not take any statement from Mr. Soller. I had a conversation with Mr. Hartzell in which he referred to his first contract with Mr. Soller. Mr. Hartzell told me that the first contact he had with Mr. Soller was approximately May or April of 1941, in person at Mr. Soller's office. Mr. Hartzell told me that at that time they did not do any business. Hartzell stated that he was then living in Chicago and was employed with the State of Illinois. I believe he stated he went to Detroit in June of 1941, and that he contacted Mr. Soller from Detroit by telephone. Hartzell said that was shortly after September, 1941, September or October, I am not certain. Mr. Hartzell did not say what the conversation was about.

I asked him as to the nature of the conversation at that [fol. 60] time, particularly as to whether he had asked Mr. Soller if he would do some business for him, but he did not answer me in that regard. He merely stated that he had called Mr. Soller to determine whether he was still in business. He did not specifically state whether or not he had determined that matter. He said he had sent him some business and stated that he sent Mr. Soller a manuscript entitled "The Blood Sacrifice," to mimeograph for him 600 copies thereof. Mr. Hartzell was not certain as to the exact time he sent the manuscript, but he did mention to me an approximate date, which was some time between June and November, 1941. I believe it was close to September. The manuscript was submitted by Mr. Hartzell a few days after the conversation had in September. I believe the first two weeks in September would be correct. He said something about sending other material from Detroit, and stated that within a fairly short period of time after sending the manuscript I just mentioned, that this same article entitled "The Blood Sacrifice" was revised by him and that he sent the revised manuscript to Mr. Soller and directed Soller to make up an additional 400 copies and mail them to him. I believe he said that was in the first part of October, 1941. He stated that he left Detroit in November, 1941. He said there were only two manuscripts sent from Detroit. Mr. Hartzell stated that the 600 copies were sent by Mr. Soller from Chicago to Detroit by American Railway Express.

(Adjournment taken to January 7, 1943.)

Cross-examination.

By Mr. Rankin:

I am 32 years of age, educated in Chicago. I attended grammar school and high school here and received an A.B. Degree from St. Mary's at Mundelein, Illinois, and received a Doctor of Jurisprudence degree at Loyola University in Chicago.

I was not admitted to practice here. I passed the bar examination but prior to being admitted I joined the bureau. I took the examination and passed it and appeared before the Character Fitness Committee on Friday and the next day I moved to Washington to assume my present position.

As yet I have not had an opportunity to be admitted formally.

I have been with the Federal Bureau of Investigation since October, 1940. I am Special Agent of the F. B. I. and as such it is my duty to investigate and gather evidence concerning any violations of the laws of the United States [fol. 61] falling within the purview of our jurisdiction, and to gather evidence in any case in which the United States is or may be a party in interest, whenever I am assigned for that purpose. I was assigned to accompany other agents to Mr. Mecartney's office on September 5, 1942. I was there on that date and later in the afternoon of the same day, I was assigned to locate Mr. Hartzell to ask him to come down to the Chicago office of the F. B. I. for questioning. I did not see Mr. Hartzell on that date.

I first saw Mr. Hartzell between 2:30 and 3:00 o'clock on the following date, September 6, 1942, at his place of residence at 21 West 110th Street, Chicago. At the time I saw Mr. Hartzell I was accompanied by Special Agent Gregg of the Chicago office of the F. B. I. and Special Agent McCabe of the Military Intelligence Division. I talked to Mr. Hartzell at that place for about twenty minutes, and then came down town. Mr. Hartzell came with me.

The statement that was taken was not taken on that date. I did not have a warrant for Mr. Hartzell's arrest on that date. I believe a warrant was taken out subsequently. It did not come into my possession. I knew of the charge that was laid against Mr. Hartzell in the complaint or warrant.

In preparing the statement of Mr. Hartzell, which was shown to me here on the witness stand yesterday, I discussed the fact with Mr. Hartzell that evidence had been gathered by other agents as well as myself.

Mr. Rankin: I note that this exhibit has no corrections on any of the different pages; who typed this exhibit?

The Witness: A stenographer; a lady stenographer in our office. The statements in the exhibit were partly dictated by me to the stenographer. Perhaps I might explain: Mr. Hartzell had previously related to me the facts contained in the statement, and I had taken copious notes during the period of time that Mr. Hartzell was talking, subsequently myself and Special Agent Johnson, accompanied by a stenographer, interviewed Mr. Hartzell in his room in our office, and at that time with the aid of the notes

which I had previously taken during the course of my conversation with Mr. Hartzell and with Mr. Hartzell's approval, dictation was given to the stenographer. As I spoke, however, before the stenographer was permitted by me to take anything down in shorthand, it had to receive [fol. 62] Mr. Hartzell's explicit approval, and in very, very many instances the dictation was given by Mr. Hartzell in his own words, in view of the fact probably he preferred certain grammatical and oratorical constructions in the statement rather than the ones that I had used.

Between Mr. Hartzell and me the statement was constructed. The time of taking this statement on September 8, 1942 was approximately from 10:30 in the morning to 1:30, during which time Mr. Hartzell gave me the information contained in the statement, and then a conference between us was discontinued at that time to permit Mr. Hartzell to have lunch, then at 3:00 o'clock, approximately at that time, I returned and talked with Mr. Hartzell in the presence of the stenographer and Special Agent Johnson, and continued with the statement, and at that time the conference lasted from 3:00 o'clock until approximately 8:00 o'clock P. M. in the evening.

Between those two times the document was built up, constructed and signed. There were carbon copies made of it. Mr. Hartzell read it over. Certain portions were read aloud but in the main not. No one read it aloud to Mr. Hartzell.

At that time I knew I was preparing the statement for use in court. There was a suggestion made to Mr. Hartzell that he need not make the statement unless he wanted to. I made that suggestion to him. I said that the statement he was going to give us was one that might be used against him in a court of law; that he was not obliged to give me a statement, to give the statement he subsequently made. He made no objection. By way of reply he started giving me the statement which is before you.

Mr. Rankin: Q. But he made no reply to your statement direct?

The Witness: A. In this respect, he told me that he intended to plead guilty.

Mr. Rankin: I move that be stricken out, your Honor. I didn't ask him for that. I asked him if he made a reply.

The Court: He said he made a reply, that is an answer.

Mr. Rankin: That ought to go out, your Honor.

The Court: No.

Mr. Rankin: I didn't ask for any volunteered——

The Court: He said, "In this respect."

Mr. Rankin: All right, but he has no right to characterize a reply or volunteer anything, any statements.

[fol. 63] The Court: The objection will be overruled.

Mr. Rankin: May I have the question read?

(Question read.)

That calls for yes or no, your Honor, and not for that kind of a remark.

The Court: I don't think necessarily so. If that was the reply that was the reply.

Mr. Rankin: I didn't ask for it. I asked for a yes or no answer, your Honor.

The Court: I can't agree with you. I can't agree with you.

Mr. Rankin: I take an exception, your Honor.

The Witness: I did not have before me at that time the charge which was made against Mr. Hartzell. He did not say what he was going to plead guilty to. I have prepared other statements from time to time for my organization. It is rather difficult to state how often; perhaps fifteen times. From time to time the taking of statements is required; not every week.

I refreshed my recollection before I came here as a witness by reading the original notes I took at the time I talked to Mr. Hartzell. I did not read this statement over.

I saw the trunk which I mentioned in my testimony at the office of the F. B. I. I did not bring it from the residence. I know who did: Special Agent John Savage of the Chicago office. I first saw the trunk on the morning of September 8, 1942. That was before this statement was prepared. I did not arrange the documents for their introduction here in evidence. I first initialed all of the documents which I removed from the trunk so that I might be able to identify them later, and I submitted them to Mr. Hartzell to identify as his, and he did so by placing his initials on each page of each of the documents. Then I had them placed in an exhibit file for proper retention. They were not placed in these transparent files. Mr. Hartzell was not present at the time the trunk and contents were examined. He was in another room of the Chicago office of the F. B. I. There were documents and papers in the

trunk other than the ones shown here. I do not know of my own knowledge what was done with those, but I have been informed that they were, together with other belongings and possessions in the trunk which were considered irrelevant, returned to Mrs. Hartzell. I determined the relevancy.

[fol. 64] The waiver of search of the premises of Mr. Hartzell was a typewritten form and I filled in the appropriate spaces with the exception of the signature. That was presented to Mr. Hartzell on September 6, 1942 at his place of residence. He was there; I was there with him. That waiver of search did not apply to the trunk; that applied to the search of the premises at 21 West 110th Street, which was his home. The trunks were not recovered there.

JOHN J. SAGE, a witness for the Government, testified as follows:

Direct examination.

By Mr. Kelly:

My name is John J. Savage, residence, Chicago, Illinois; business, Special Agent of the Federal Bureau of Investigation, assigned at present to the Chicago Field office. I was so assigned in the month of September, 1942.

I know Elmer Hartzell; I see him in the courtroom sitting at the table.

On September 6, 1942, I had occasion to go to 21 West 110th Street. Special Agent Carroll, Agent Johnson, Agent Gregg, and Agents McCabe and Harris of the Military Intelligence were with me. I assisted Agent Gregg in the search of the premises occupied by Mr. and Mrs. Hartzell at that address. I conducted a search through the premises at that time.

(Document marked Government's Exhibit 68 for Identification.)

I have heretofore seen the articles and postcard, and slip of paper, on which something is written, contained in the cellophane wrapper. I saw the postcard in the room occupied by Mr. and Mrs. Hartzell, and the writing on the slip of paper was done by myself on the 6th of September, of last year.

(Postcard marked A and slip of paper marked B.)

After the search of the room, Agent Gregg prepared a list of the articles which were found in the room, which were considered pertinent to the investigation, and had Mrs. Hartzell sign her name to that list for the purpose of designating the articles which we were taking to the Field Office of the F. B. I.

On September 7, 1942, I had a conversation with one, [fol. 65] Andrew D. Schimant, pursuant to which I searched a small closet, or storeroom, located in the basement of his home at 149 South 14th Street, Maywood, Illinois. In that closet were a considerable number of cardboard boxes, several trunks, a suitcase and a Multiplex typewriter. We were unable to open a suitcase and the trunks. After examining the cardboard boxes we proceeded to take the boxes and the two trunks, the suitcase and the Multiplex typewriter, to the Field Office of the F. B. I. The trunks and boxes were tagged with the name and place where they were found and placed in a storeroom in the office of the F. B. I. in Chicago, and also on the tag was placed an identification mark.

(Document marked Government's Exhibit 69 for identification.)

Government's Exhibit 39 for identification, purporting to be a number of scraps of paper with writings on them, were found on September 8, 1942, in the garbage can located in the rear of the premises at 21 West 110th Street, Chicago. They were found by Special Agent McCarthy and myself and Agent Harris of the Military Intelligence. When found we placed them in envelopes and returned them to the office of the F. B. I. in Chicago.

Cross-examination.

By Mr. Rankin:

Special Agent McCarthy of our office and Jack Harris of the Military Intelligence were with me when I went to the Maywood place. Mr. Hartzell was not with me.

I saw Mr. Hartzell just a few minutes when we were at the Hartzell home. He was not with me on the occasion when we went to the Maywood place. I saw him on his premises.

RALPH J. GREGG, a witness for the Government, testified as follows:

Direct examination.

By Mr. Kelly:

My name is Ralph J. Gregg, residence, Birmingham, Alabama; occupation, Special Agent for the Federal Bureau of Investigation, assigned at present to the Birmingham field division.

In the month of September, 1942, I was assigned to the Chicago field division. I know Elmer Hartzell; he is sitting at the end of the counsel table. (Witness identifies defendant Hartzell.)

[fol. 66] On September 6, 1942 I saw Mr. Hartzell at his residence at 21 West 110th Street, Chicago, Illinois. I had a conversation with him there. Present with me were Special Agent Joseph Carroll of the Chicago field office, and agent McCabe of the Military Intelligence Division of the United States Army. I was introduced to Mr. Hartzell as a special agent of the F. B. I., and Special Agent Carroll identified himself as a special agent of the F. B. I. and introduced me as the same.

I have seen Government's Exhibit 66, being the waiver of search dated September 6, 1942. I saw that at 21 West 110th Street, Chicago, Illinois. I affixed my signature as a witness to the signature of Mr. Hartzell, who signed it in my presence on the date it bears. Pursuant to that waiver we made a search of the room occupied by the Hartzells at that address. I found a Royal portable typewriter and numerous other articles which I took to the Chicago office of the F. B. I.

(Document marked Government's Exhibit 70 for Identification.)

I have seen Government's Exhibit 70 for identification which purports to be a case containing a typewriter. Special Agent Savage and I found that in the Hartzell room. I can identify it because of a tag which I prepared and attached thereto bearing serial number and my initials and the date. Also by a paper bearing the same information including the address at which it was obtained, which was

pasted on the inside of the cover, and also by my initials which I placed on a portion of the frame.

(Government's Exhibit 70, being a typewriter, is admitted in evidence.)

ANDREW D. SCHIMENT, a witness for the Government, testified as follows:

Direct examination.

By Mr. Connor:

My name is Andrew D. Schiment, residence, 149 South 14th Avenue, Maywood, Illinois. I own that house and rent apartments in it. I have three apartments. I know the defendant Hartzell; I see him in the courtroom. I rented an apartment to Mr. Hartzell commencing in January, 1942. I think he left in June of that year. When he moved away he said the company had shipped him to South Chicago. He was working in the Buick plant in Melrose [fols. 67-68] Park. He asked me to let him have some place to keep his things until he got a bigger place and he would come and take it. I have a small room under the stair way back and the trunk he got in the basement.

Cross-examination.

By Mr. Short:

I just let Mr. Hartzell take some space in my building to store some things for a while without rent. He paid his rent up when he left.

* * * * * * *

[fol. 69] Mr. Kelly: I will read a few of these pamphlets that have been introduced in evidence to the jury.

Mr. Rankin: But not as to Mr. Hartzell, because no proof has been made as to him.

The Court: I will reserve my ruling; and will tell the jury later.

(Pamphlet Govt's Ex. 2 entitled "The British an Inferior Breed" read to the jury by Mr. Kelly:)

[fol. 70] GOVERNMENT'S EXHIBIT 2

The British:

An Inferior Breed

Are they degenerate?

Plainly. Never again shall they be permitted to try to bring the slinking death of starvation to Europe, squealing hysterically as they do so about "freedom".

What is the present position of our "protectors"; proclaimed saviors of Poland?

Now on the lease-lend dole, they are a kept woman.

Are they a cultured people?

Standing as an outpost to the continent of Europe, they are a parasite on its art, science and civilization.

In What way are they kept flying?

The Germans keep 'em flying wherever they find them. They run at the mouth as well as the bowels.

Will the British Isles be policed?

It will be unnecessary. When the people upon whom they are fastened withdraw their support, they will collapse.

What is the new blasphemy?

Making Christianity a slimy thing for those who crawl and creep by an island breed which—possessed of an empire obtained by aggression—points the finger of guilt at others. They are now fighting for Christ with bloody Joe.

Who betrayed America to the empire of the British-Jewish yellow race?

Rosenfeldt. We are victims of his Infantilism; he cannot stand alone.

Are Jews rushing forward to war after urging you to crush 'em?

No. But when America is exhausted they, as in Russia, will slither forth to sink their fangs into its body.

Are Americans United?

Yes. Externally with the corpus of a degenerate empire; internally with the sick body of "our leader".

What is behind the doctrine of "no appeasement"?

The fear of aggression on the bloated domains of an empire which cannot stand alone;

[fol. 71] The inhuman cruelty of America's first blood soaked boom;

The rumble of world revolution—repercussion of its indecencies;

The effort of the Jew—vicious persecutor of peoples—to save himself;

The disease of a Paralytic who wants to be a hero as compensation for his ailment;

The beginning of insanity as the masses of the so-called "democracies" are led toward the destruction of Europe, homeland of the West.

Why was Pearl Harbor evidence of justice?

While trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific. Like a cow hit on the head by a hammer when led to slaughter, we now follow "our leader" as he moves forward on a sick spine to war.

(Pamphlet Govt's Ex. 3 entitled "The Jew Makes a Sacrifice: Forthcoming Collapse of America" read to the jury by Mr. Kelly:)

GOVERNMENT'S EXHIBIT 3

THE JEW MAKES A SACRIFICE:

THE FORTHCOMING COLLAPSE OF AMERICA

. Our blood soaked boom of the first World War was followed by a speculative orgy, then collapse. A similar maladjustment now seeks an outlet in another blood soaked boom which will end as before. In all of this the Jew—oriental hyphenated American, propagandist for bloody Joe and the British (Jewish) empire—has been an eager participant. Indeed, like a snake forced from its nest, the slimy blood lust of the "holy people" now stands revealed—for is it not evidence that the Jew hates bloodshed only when his own skin is in danger?

Let us consider briefly some of his characteristics.

The mentality of the Jew was exemplified recently by Leon Henderson when he wrote that "in 1942 as our con-

tribution in the way of the merchandise of death, we are prepared to deliver a greater quantity of goods than this entire nation had to keep it alive in 1932". The Jew, in fact, makes his way among those with whom he lives by boring from within—by aggression concealed under holiness and hatred of force. When cornered he makes loud outcrys about the guilt of others who "persecute" him. [fol. 72] He does not engage in many occupations such as that of farmer, sailor, mechanic, necessary for the support of a state; he must, therefore, live among other peoples to prevent his own collapse. Since the weight of the community in which he lives does not rest upon him, his position as a specialized group is unstable; he oscillates back and forth, reflecting as he does so fragments of what he considers the world to be, through all of which runs a thread of egoism which portrays him as a grand parasitic ruler.

He moves in a community with the idea of retaining his identity while at the same time reducing the disparity between himself and others by lowering standards, as in business. He escapes or is unfitted for many kinds of indispensable work, but makes a loud outcry about persecution when vents for his racialism are interfered with. As he lays concealed or slithers around within "democracy", part of his technique is to stress the need for tolerance, particularly so if, as in Germany, he is caught at his unclean work.

As a parasite he is sensitive to trends: he feels influence quickly which effect his welfare. Associated with his intrusion into the privacy of others in the interests of his own preservation is a fear of isolation. Connected with his frequent need for overcoming disgust for his person is an emphasis on money, wherewith he buys his way. Among related peoples—Turks, Arabians—he does not make much headway.

The Jew God is used for purposes of the greatest of all idolatries—self Worship and survival. For if a people believe they are "chosen" almost anything they do is regarded as right if it preserves them: God is used to get beyond good and evil. Note, for instance, the two sides of the Bible—the first teaching vengeance, the second meekness. A vast scope is therewith obtained for emphasizing the side suited to his (or your) needs, that is, God becomes a two faced instrument of torture—a bone crusher for use

by the cunning. Today, in fact, almost any crime may be committed in his name in connection with fine words such as "freedom". How else justify blood soaked booms; attempts to starve Europe by blockade; an alliance with bloody Joe; and the massing of enormous quantities of men and materials with which to "crush" the Germans—except by offsetting the degeneracy of such acts by declaring them to be dictated by the "spirit".

The oriental Japanese struck at Port Arthur in 1904, [fol. 73] and at Pearl Harbor while negotiating. The Jew does not have their manfulness for open warfare, but he will—while conserving his own blood—eventually strike those with whom he lives in the back. He is now infiltrating into Government jobs under cover of "no race prejudice". He is, in fact, "dying" for the coming of bolshevism by making ready for your collapse. After many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest.

Are you not weary of the observation that the international parasite survives to see nations come and go? Distinguish then you must between white and yellow races or accept the slaughter of your sons by internal revolution of war abroad. Crush my enemies he screams! But there can be no further appeasement of his blood lust: no peace until the slaughter he brings to others returns upon himself. He must be eliminated as an active element in the community.

(Pamphlet Govt's Ex. 15A entitled "The Diseased Spinal Cord" read to the jury by Mr. Kelly:)

GOVERNMENT'S EXHIBIT 15A

THE DISEASED SPINAL CORD

Wilson died an invalid; Roosevelt became president one. What is the social significance of his condition?

A clue is given in the statement that syphilis is "the result of an illness of moral, social and racial instincts" of which prostitution is an integral part.[1] Similarly the

[1] Adolph Hitler, Mein Kampf, (N. Y. 1940), p. 349.

breakdown of Wilson after the "peace" was probably connected with reactions from the emotional debauchery of preceding years. It is, therefore, suggested that the epidemic of paralysis in New York State at a later time had a source in the weakening of nervous systems, brought about by the emotional self-masturbation of stories of the "bad" Germans.

Our leader—safe in Washington—escaped the actual horrors of war, but he could not escape the virus of a child's disease.[2] As with syphillis his paralysis is indicative of [fol. 74] severe maladjustments within the nation. He reproduces within his body our internal breakdown: he is in fact a degenerate who now seeks ways of having us cure him of his ailment.

United with a paralytic.

With the cunning and sweetness of a cripple he kept us out of war. His duplicity is in part a result of a lack of coordination between brain and injured nervous system. Connected with the accompanying inferiority is a fear of isolation—a craving to be united. He would as a consequence extend his sickness over all the world. Almost everyone would then be equal, united, with no one able to stand alone.

Not long ago we "saved ourselves" by a program of relief—from the enervating effects of which we were unable to rise by manful effort. From the accompanying decay an external enemy was needed upon which to fasten the blame. Uniting with the decaying carcass of the British empire and war against the Germs were taken as solutions to the problems: they serve as counterpoises to our internal breakdown. For the condition of which his illness is a symptom requires continually widening spheres of action to prevent breakdowns from its ravages.

The enemy within.

Hidden within the present program to save humanity are germs of infantilism, paralysis and death. For we

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[2]Infantile paralysis is a disease of "the spinal cord and the central nervous system. * * * When nerve cells of the brain are involved the type is 'bulbar'. * * * Most of the reported cases occur in younger children." See the bulletin of the National Foundation of Infantile Paralysis, Inc. (N. Y., 1941), pp. 7 and 10.

now follow, not a little child, but a man with a child's disease.

I dare you to hit me said our leader to the "bad" dictators. He now twists on his weak spine as we move irresistably toward the feared spectre—isolation. For as the people of Europe slowly unite to repel invaders who mouth over phrases about peace, God and civilization, many are beginning to recoil with horror from a proposed invasion of Americans who, as before, would only accentuate world revolution.

Crush my enemies screams Jewry; be bold; take the offensive; we'll back you up. We're fighting for freedom says our leader, with his sick body coiled around the brain as with a snake prepared to strike. We're fighting to save Poland say the British hysterically; we hate other peoples aggression.

America was betrayed. The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by:

[fol. 75] A stench from rotting carcasses of those who would again invade Europe;

Starvation for millions of British who thought they could starve others;

Dissolution from an internal war of race against race;

Occupation by foreign troops until we are able to stand alone; and at last

The appointment of a bedside cabinet to investigate the condition of (Rosenfeld) our leader.

Government's Exhibit No. 43, being the Statement of Elmer Hartzell, was received in evidence, read to the jury, and is as follows:

GOVERNMENT'S EXHIBIT 43

Chicago, Illinois
September 9, 1942.

I, Elmer Hartzel make the following voluntary statement to Joseph F. Carroll and George R. Johnson whom I know to be Special Agents of the Federal Bureau of Investigation. No threats or promises of any kind have been made to secure this statement from me and I know that anything I say herein may be used against me in a court of law.

I was born September 9, 1891 in New Castle, Pennsylvania and am of remote Scotch, Irish and German descent. Both of my parents were also born in this country in New Castle, Pennsylvania. I attended public grammar school in the city of my birth from 1897 to 1906 and the Grove City Preparatory School at Grove City, Pennsylvania from 1906 until 1909.

Between the years of 1909 and 1917 I worked at various jobs including employment with a wholesale butter and egg firm then located at 205 Ferry Street, Pittsburgh, Pennsylvania and the Pennsylvania Railroad, my employment at the latter place being as a switchman at Youngstown, Ohio.

In May 1917 I enlisted in the United States Army and was assigned to the University of Pittsburgh Base Hospital #27. As a member of the base hospital #27 I saw eighteen months duty overseas. I was honorably discharged from the Army at Camp Dix, New Jersey on April 1, 1919.

Between 1919 and 1923 I held various jobs, among them being employment in the Production Control Department of the Goodyear Tire and Rubber Company at Akron, Ohio and also as a sanitary inspector with the Health Department of the City of Akron, Ohio. At the same time during [fol. 76] this period I attended the University of Akron, Ohio where I majored in Business Economics, being graduated therefrom in 1923 with a Bachelor of Science degree. Between 1923 and 1926 I was a student at the University of Chicago in the Department of Commerce. I again majored in Business Economics and related subjects.

In 1927 I secured employment as an investment statistician with the National Bank of the Republic in Chicago, Illinois now merged with City National Bank and Trust Company. At the end of 1927 I resigned this position and for the next six months worked for the Fitch Publishing Company on Pearl Street, New York City. In September of 1928 I began employment with Kissel, Kinnicutt and Company on West Adams Street, Chicago, Illinois as an investment analyst, remaining there until that office was closed in the financial crash of 1930.

Between 1933 and 1938 I was employed at various times with the State of Illinois, Department of Mines and Minerals at Springfield, Illinois, Fernandes and Company, an investment firm at Springfield Illinois, The Cook County Bureau of Public Welfare, Stock Yards Station, Chicago,

Illinois, and in the performance of part-time work in the library of the University of Chicago.

In the latter part of 1938 I assumed employment with the Division of Unemployment Compensation of the State of Illinois, which is located in the Merchandise Mart at Chicago, Illinois. I remained there until July 15, 1941 at which time I became a civilian employee of the Aircraft Division of the United States Army Air Forces, Audit Section being assigned as a senior fiscal accounting clerk to duties at the Packard Motor Car Company in Detroit, Michigan. I remained at this latter firm until November 1, 1941 when I was transferred, still in the capacity of a civilian employee of the Army, as indicated above, to the Buick Aviation Engine Plant in Melrose Park, Illinois, remaining there until June 13, 1942 at which time I was transferred to the Pullman Standard Car and Manufacturing Company, 910 East 103rd Street, Chicago, Illinois.

Aside from certain articles concerning Business Economics and related subjects which I had published in the Harvard Business Review, Journal of Political Economy and the Journal of Business Economics, University of Chicago and the Accounting Review, other writings which I composed are as follows:

The case of T. V. Smith; Congressman at Large.
[fol. 77] Revolution Will Come to America.
The President's Illness.
The Blood Sacrifice.
The Jew Makes a Sacrifice; The Forthcoming Collapse of America.
The British: An Inferior Breed.
The Diseased Spinal Cord.

With references to these above enumerated articles I should like to make the following remarks:

The article concerning T. V. Smith was comprised of about three mimeographed pages. I had about 250 copies of this article mimeographed by a young man whose name I do not now recall, who did typing and mimeographing work from his residence on East 57th Street near South University Avenue. When I submitted the manuscript to him for mimeographing it was handwritten in my writing. This occurred approximately in the year 1938.

With respect to the article entitled "Revolution Will Come to America" I composed this in approximately Jan-

uary of 1941. This article was composed of two parts, the first part dealing with the tendency of this country toward war and hinting at the potential results thereof, the second part dealing with what I considered to be pertinent quotations from prominent personages. I had 200 copies of this article mimeographed by a woman who resides on East 57th Street near South Harper Avenue. The original copy was handwritten. I do not recall this woman's name but she did the work from her residence at which place she occasionally did some public typing. In mimeographing the copies of my article she used a hand operated mimeograph machine. This woman was between thirty and thirty-five years of age and was married. Her residence was located on the first floor in the middle of the block on the south side of 57th Street.

The next article that I wrote was entitled "The President's Illness" and I had about 200 copies of this article mimeographed by the young man referred to above who operated from his residence near 57th and University. I do not recall the specific date that I composed this article but it was within a few months after my writing of the "Revolution Will Come to America."

I composed the article entitled "The Blood Sacrifice" while I was employed at the Packard Motor Car Company in Detroit, Michigan. I had 1000 copies of this article mimeographed by Elmer Soller of the Reliable Letter and [fol. 78] Addressing Company located at 800 West North Avenue. At this time I might mention how I came to have business relations with Soller.

While I was still employed with the Division of Employment Compensation for the State of Illinois, approximately in May of 1941, being desirous of making connections with someone who was professionally engaged in doing mimeograph work I began to look for a contact.

I went to the office of the German American Alliance which is located on North Avenue within a couple of blocks of Halsted Street, believing that they might know someone who could do mimeograph work who was averse to war against Germany. I did not speak to any official of the organization but merely presented a request to two women who were at that time working in the office of the German American Alliance, that they refer me to some mimeographer that they knew. After consulting some list in their office they referred me to the Reliable Letter and

Addressing Service, 800 West North Avenue which is operated by Elmer Soller.

I made my first visit to the office of Elmer Soller in approximately May of 1941. At this time he was sharing office space with Hans Reichel an agent for a foreign travel tourist bureau. On the occasion of this first visit to Soller's office I conversed with him concerning his doing some mimeograph work for me.

As I recall I did not have any mimeograph work done for me by Soller before I went to Detroit, Michigan on the occasion of my transfer. In about September, 1941 I telephoned Elmer Soller from Detroit, Michigan using a public pay booth in a drug store located near my place of residence, 1741 East Grand Avenue. At this time I enquired if he was in a position to do some work for me. A few days later I sent him, through the mails a handwritten manuscript in my writing entitled "The Blood Sacrifice."

A few days later a package containing the completed work, namely 600 mimeographed copies of the above entitled article was received by me at my residence, 1741 East Grand Ave., Detroit, Michigan, via American Railway Express. This package was delivered C. O. D. and I paid C. O. D. charges which amounted to approximately $10.00.

In October of 1941 I made certain revisions in this article and had the revised article typed by a public stenographer located on the second floor of a hotel, the name of which I do not recall but which is situated katty corner from the General Motors Building.

[fol. 79] With this revised manuscript I also transmitted to Soller a cash remittance, payment in advance. Attached to the manuscript was a handwritten note directing Soller to make up 400 mimeographed copies and outlining details concerning spacing and margin. A few days later I received through the mail at my address in Detroit, namely 1741 East Grand Avenue, a package containing the completed work.

In November of 1941 I was transferred from Detroit to Chicago in the same capacity to the Buick Aviation Engine Plant in Melrose Park, Illinois. In approximately January, 1942 I stopped at Soller's office concerning some contemplated work.

Several months later in May, 1942 I called in person at Soller's office and handed to him two typewritten manuscripts entitled "The British: An Inferior Breed" and

"The Jew Makes a Sacrifice: The Forthcoming Collapse of America". Soller prepared 600 mimeographed copies of each of these articles, and I called for the completed work a few days later.

In about July, 1942 I submitted to Elmer Soller for mimeographing a typewritten manuscript entitled "The Diseased Spinal Cord". I ordered 600 copies. A few days later I met him on the corner of Randolph and Michigan in front of the public library and he gave me the copies of my article and in payment I gave him about $6.50.

Concerning the above enumerated articles I mailed copies of same to various individuals and organizations which appeared on my mailing list. The mailing list was compiled from various sources such as:

1. World Almanac (containing names of various prominent personages, associations and lists of fraternities, etc.)

2. A government publication containing a list of labor unions.

3. People actively engaged in the America First Committee whose names were mentioned in newspapers.

4. American Legion State and District Commanders, whose names were obtained through telephone directories at the Public Library.

5. Various patriotic organizations such as the "Daughters of the American Revolution" and "We The Mothers Mobilize."

Envelopes for the mailing of my articles were purchased at different places where stationery is sold. Addresses for the envelopes were at first hand printed. All of the others [fol. 80] were typewritten. Until recently I did not own a typewriter myself. The envelopes containing the articles "The Case of T. V. Smith: Congressman at Large" and "Revolution Will Come to America" were addressed by hand. With reference to the original article which I composed and distributed from Detroit entitled "The Blood Sacrifice" it was sent out by me in envelopes which were addressed for me by the same public stenographer located in the hotel situated katty corner from the General Motors Building in Detroit, Michigan. The revised article bearing the same title was placed in the mail by me in Detroit in

envelopes which were addressed by a public typist located in the General Motors Building, Detroit, Michigan.

In about May, 1942 I purchased a Royal Portable typewriter. From that time on I typed the addresses on the envelopes containing the literature I subsequently distributed, using this typewriter to do so. Using this same typewriter I also typed the original manuscripts of the last three articles I wrote as indicated above.

On each occasion after receiving the mimeographed copies of a particular article, as related above, I myself would fold them and place them in the envelope preparatory to mailing them out. In doing this work I did not receive assistance.

With reference to my wife she had nothing to do with the composition of the articles mentioned here and as a matter of fact she protested against my sending them out. She gave me no assistance in the mailing of the articles. There were times when I asked her to assist me but she refused. I know that she did not approve of the articles. I might mention that Mrs. Hartzel's parents came to this country from Czechoslovakia, this indicating what her sentiment might be.

An additional reason for her disapproval of my actions would be the fact that she th ught I might injure our home life. Mrs. Hartzel had a good deal of faith in me and consequently while she could not bring herself to participate with me in my activities she did not actively combat me.

Finally, the prime motive which impelled me in writing and distributing the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races.

I have read the foregoing statement consisting of six [fol. 81] typewritten pages and I fully understand its purport, and acknowledge that everything contained herein is true and correct to the best of my knowledge and belief. I have placed my initials on the first five pages and have affixed my signature to the last page.

'signed' Elmer Hartzel.

Witnesses: Joseph F. Carroll, Special Agent, FBI; Chicago; George R. Johnson, Special Agent, FBI, Chicago.

And Thereupon the Government tendered in evidence its

various Exhibits heretofore identified and severally marked as exhibits in the case but not as yet admitted generally or specifically; and thereupon the defendants objected to the admission of said Exhibits on the ground that they did not tend to prove the charges laid and that they were irrelevant and immaterial and incompetent, which objection the Court overruled and the said Exhibits were received in evidence as follows:

As To All Defendants

The following exhibits were admitted as to all defendants: 1 to 25, 26 to 26c, 28, 30, 33, 34a to 39, 68, and 76 to 80.

As To Hartzel Only

Exhibits 42 to 44, 46 to 48, 49 to 59, 50-a, 50-b, 50-c, 60, 62, 63, 64, 65, 65-a, 65-b, 66, 67, and 69 to 75.

To which ruling of the Court the defendants excepted.

Thereupon the following document was received in evidence as Government's Exhibit 42 and considered by the jury:

Government's Exhibit 42

The Blood Sacrifice

As Americans are made aliens in their own land by the endeavor to save the British—the worst aggressors of history—from effects of their own aggression, attention is directed to a group within which is loud about the virtue of defense by offense, or protecting ourselves by protecting [fol. 82] our "protector." Representatives of this group—Morgenthau, LaGuardia, Blum, Warburg, Lehman, Frankfurter, Hillman, Henderson, Rosenman—are active in putting phrases onto the lips of "our leader" concerning the spirituality of being an arsenal for a foreign power.

From the stupefying after effects of our first blood soaked boom, we have been unable to extricate ourselves by constructive thinking. To recover from its paralyzing effects, a shock has been necessary, a shot in the arm, another blood soaked boom.

In times long past, this need for bloody incentives was propitiated on the altar of religion by human or animal sacrifices. It was, indeed, at last symbolized within Christianity by the sacrifice of the son of God, propounder of a doctrine of gentleness, pity and love. But the Jew has no

such device for sublimating the lust for blood, hence behind his proclaimed horror of force is a distorted blood lust which seeks an outlet.

The Jew is no soldier, but he can quench his thirst for human sacrifice by inciting you to bloodshed against others —the Germans, for instance, who, having analyzed his mentality, object to his indecencies. The Jew does not, in fact, shrink from having you perpetrate another crime against Europe. He would in that way put you on the cross, wailing meanwhile about anti-semitism and his hatred of bloodshed.

Residue of an eastern Mediterranean civilization—the Jew makes his way among you under cover of his holiness. But the universality claimed for his religion is offset by his view of himself as a superlative one who can, at last, only wrong you by wronging God who is, so he thinks, the counterpart of himself.

Hence, to the Jew, democracy means for you to make room for him. He strives, that is, for "freedom" from interference of those among whom he lives: He would have you be tolerant of him in order that he may be more effectively intolerant of others. When tripped in these efforts he crys "persecution."

Freedom of speech he believes in, but not outside a pattern favorable to himself. Degenerates! paranoiacs! brutes! he wails concerning those who scrape him off as a bed bug from a living organism. Thus, he insists to the right for his own kind of racial propaganda, while crying down all kinds unfavorable to himself. Yet when useful, [fol. 83] as now, he denies the importance of race although he is the most racially ingrown of all peoples.

The Jew is no pioneer. Nor is he farmer, sailor or mechanic. He has no country; his thinking about other peoples is without distinct boundaries. Detached from the soil, rootless, his individuality dependent on peoples loyal to particular localities, he needs vital people upon which to fasten. Hence, when his methods are typical of a community, self-destruction begins because of the breakdown of the supporting structure upon which he feeds.

He professes to have a horror of bloodshed, while at the same time urging you to crush others. He would pervert the life of the nation, through shedding of your blood in the interests of his own safety. As a middleman, he works

through intermediaries—through, for instance, "our leader," who would make us victims of his infantilism.

Men and women, who believe in decency, rise in protest at our bestiality. If necessary let the protest be long silent, implacable, until America is torn into parts by internal revolution, as retribution for a concealed sadism of which the Jew is a spokesman.

Thereupon the following document was received in evidence as Government's Exhibit 45 and considered by the jury:

GOVERNMENT'S EXHIBIT 45

Roosevelt's Illness

He inoculates us with the poison of a puff adder concerning the victory of the spirit over brute force through the use of bombers. For, alarmed by the revelation of internal weakness of which his illness is symptomatic, he turns with apprehension to look unknowingly at the projection of the image from within, preparing meanwhile to fight it as a "foreign" power.

Let us examine his illness in a clinical manner.

Infantile Paralysis occurs most frequently in weak and delicate young children, especially during the period of first dentition. The primary effects are on the spinal cord, but widespread pathological changes may be produced in other parts of the body, including the brain.*

Aside from the physical handicap, an understanding of psychological reactions to a deformity are important for an insight into our leader's condition:

[fol. 84] 1. As a result of long periods of hospitalization, the idea of becoming a doctor or nurse is more common and persists longer than is usual.

2. The infirm are inclined to expect the outside world to give them the same special consideration which they received while dependent on others.**

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*See the article in the *Encyclopaedia Medica* (2d ed.), VII, pp. 285-90.

**From a report of the "Rehabilitation Session" of the Illinois Vocational Association, Rockford, Illinois, (March, 1941).

3. Seriously abnormal distortions of personality may develop, as a compensation for the stultifying effects of a handicap, through the construction of "an internal world of phantasy."***

The restriction of usual outlets for acting on the world results in a narrowing of the environment accompanied by apprehension, suspicion of the environment as being alien, and a negative self-feeling from which may develop a full-blown delusion.

4. Because illness has crushed so many ambitions, the handicapped frequently hope that they will be able to compensate for their limitations by outstanding vocational achievements.

It is well to work with such cases as early as possible, since by doing, "the more obvious and impossible aspirations can be nipped."

A more significant insight is now obtainable concerning our leader's objectives: He would make himself a healer, a wet nurse for the world—excepting, of course, opponents whom he regards as "copperheads."

The specter with which he engages in combat as alien is the gargantuesque image of disruption within. For the restriction of the usual outlet for his energies as a result of his personal catastrophe results in a narrowing of his field of action, apprehension and negative self-feeling. When carried into foreign affairs such reactions to his ailment are expressed as fear of change in the *status quo*, phantasies concerning invasion, and the attribution of the negative self-feeling to the "bad dictators."

He now diverts attention away from his infirmity by "defense reactions." Unless restrained by, say, those who recognize the symptoms, such "defensive" work may take the whole nation into war. For what would better serve the purpose than to play the role of warrior—the center of [fol. 85] attention as commander of ships, planes and millions of soldiers.

Thus, in connection with chats concerning "civilization, humanity and freedom," our leader is making steady progress toward curing himself by turning the whole nation into

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***From an Introduction To Social Psychology by L. L. Bernard, (New York, 1926), p. 197.

a sanitarius of which most of the population are inmates, with the patient himself as nurse.

Thereupon the following document was received in evidence as Government's Exhibit 46, and considered by the jury:

GOVERNMENT'S EXHIBIT 46

Roosevelt's Infantile Paralysis

Americans have the uneasy feeling that all is not well; they suffer from the threat of a hidden danger. It is the prompting of a sick conscience: suppressed fear of retribution for a former blood soaked boom. Let us, therefore, investigate the ailment of him who urges us in fireside chats to repeat the sordid work.

The disease.

Infantile paralysis is an acute infectious disease, usually affecting children. It may spread, some epidemics having almost circled the globe.

The agent has not been isolated, but it is believed to be an infiltrating virus which acts in some ways like the virus of mad dogs (hydrophobia).

Changes in the spinal cord upon which it operates are those of an acute inflammation. A partial or complete destruction of nerve structures of the cord results. In some patients the infection progresses into parts of the midbrain and brain itself, tissues of which are destroyed.*

Thwarted activity.

The brain responds to the activity of the entire body: a sound brain needs a healthy body. A cutting off of the usual stimulus from some of the limbs by paralysis disturbs the balance maintained in the brain, in connection with ideas constructed concerning the outside world. A searching by the brain in stimulus from the injured nervous system for the cause of the lost harmony occurs. The numbed body may then excite the brain to inflict punishment on others for suffering which came to it silently from an ex- [fol. 86] ternal source. When the search for the cause enters into a larger sphere of ideas, it then becomes easy

* See the article by S. E. Geliffe, M.D., *Encyclopedia Americana* (1940), Vol. 22, p. 304.

to give a human basis to the affliction by attributing it to some foe abroad. Such a one might well be Russia; but better yet Germany.

Fear of the ghetto.

Although a continent lies before us for development the shout goes up—as if fearful of being confined to a sick bed—"we must not be isolated." Alas, where are the pioneers?

As those who have over-stimulated brains and a weak supporting structure need vital people to fasten upon, "our leader" would now impose his thwarted physical nature on others. Unable to find a cure for the depression within, nor maintain a stable state except as it is built on the suffering of others, people living abroad whom we do not understand are a convenient medium for the parasitism.

Limiting the strength of others.

Craving sympathy, he would put America onto a wheel chair whereon all may have fireside chats on equal terms. As compensation for his handicap he would bring the world to the invalid as a visitor to a warrior. Yea, he would reduce Americans—as well as others abroad—to a condition of helplessness such that the sick may control them.

Unable to defend himself adequately in the physical presence of an enemy, he now supports his spinelessness with mountains of munitions. Unlikely to thrive in a more virile world, he uses the vital in the interests of the decadent, to bring himself back to health. He would make himself safe by building his limitations into the world.

Duplicity.

Formerly he talked about an abhorrence of brute force; now of being an arsenal for Britain, and an invasion of foreign ideas. He is as a ventriloquist's dummy for islanders who, with monocle and affected accent, are laughable specimens of a departed age. Behind him stands Morgenthau—representative of the holy people—insinuating ideas of a decadent race: he would have you save Jerusalem.

Without the forthrightness of dictators, whose ways he apes, he gives off drool concerning invasion. Lacking re-

spect in your ability to govern yourselves, his promises are a rattle, not of warning but of deception. While appealing [fol. 87] to your sentiments with fireside chats concerning humanity, you are inoculated with ideas induced by fear concerning defense by offense—a shameful exhibition of duplicity, an insult to your status as men.

Lurking behind sweet phrases is a lust to counteract effects of his incapacity by violent methods. He is ready to engage in mass murder with the flimsiest pretexts in order to bring himself—and those whose illness he represents—back to health. Afraid of outright slaughter he would—put others out in front to do it for him. He has indeed no objection to crushing others if effected indirectly as, say, an arsenal for Britain. Nor is he shocked by a coward's blow such as that of the islanders after they saw Germany engaged in 1914 on the east by Russia, on the west by France—provided it is struck by our "protectors."

Internal stress.

Beliefs concerning peoples against whom "our leader" would make war are a reaction against internal weakness from which he looks away. Sickened by years of following an internal policy of least resistance, he insists as a cure for our jitters upon the maintenance abroad of the *status quo*. Blaming our debility on others abroad—of whose contributions to music, philosophy and science he is only vaguely aware—our energies are whipped up by the prospect of another blood soaked boom, made respectable by unctious phrases about humanity. Expansion having ceased within, movement is involuntarily out: we march toward war. It is to supply the shock to cure the innervation within, as well as the opiate to relieve the pain of decay.

Undeclared war to aid the islanders is war against America. But hypnotized by phrases, we are led toward war.

The public opinion which incited an expedition in 1917 is one of the foulest examples of brutality and self-delusion of which there is any record. Our hero—safe in Washington as before—would repeat the disgusting work.

Thereupon the following document was received in evidence as Government's Exhibit 47, and considered by the jury:

[fol. 88] GOVERNMENT'S EXHIBIT 47

The Condition of Our Leader

He fears the "isolation" of the pioneer; the independence of people able to stand alone.

As with those who have a compulsion neurosis, he induces conditions whereby the invasion he fears will be made certain. Sterile of ideas he follows a line of least resistance by copying the pattern of totalitarian states, at the same time denouncing their originators as "bad men." But his susceptibility to external influences also makes him incapable of resisting the European matrix of war, of which his plans are a copy. It is this which defines the *compulsion* of his *neurosis*.

The Bedside Cabinet.

Indicative of the forthcoming collapse of the islanders is the lily whiteness of their "horror of aggression." At the same time the setting for internal convulsions is being prepared in America by the obvious brutishness of being, as being, an arsenal for a degenerate empire.

Isolated as enemies of mankind because of the self-righteous duplicity of saving ourselves by saving our "protector," peoples within America may turn against those who further the growth of internal strife. As the drive against the enemy within continues, a bedside cabinet may be appointed to investigate the ailment of Franklin.

The Hero.

Enormous is the lie and hypocrisy of "our leader"; grand is the opportunity for quacking about the "bad dictators"; pitiful are his dupes. Enormous have been the aggressions of our "protector," and diseased is the memory which fails to recall the indecency of our first blood soaked boom. But we are victims of an infantilism.

Sheltered as a child, he is a playboy who would play at soldiers. Safe in Washington (as before), he wants to be a hero—strong, dashing, with the youth of America at his call.

Forward then with the plowing under program; onward to the wars.

Thereupon the following document was received in evidence as Government's Exhibit 60, and considered by the jury:

GOVERNMENT'S EXHIBIT 60

Revolution Will Come to America

"Whom the gods would destroy they first make blind."

The rat is out of the bag. The English are now letting [fol. 89] down their hair; they call for help. Brutal, sterile, with the latent cowardice of the bully, the incredible duffers, after making two tail-between-the-leg retreats described as victories, have at last been pushed back onto their hind end on their island.

Unable to organize the continent of Europe after the massed brutality of the world defeated the central powers in 1918—Europe, after its butchery through the boobery and sterility of Allied "Statesmen," began to collapse under the dual weight of an ominous thrust of semi-asiatic Russia, and the massed tyranny of the "democracies," tolerant only within their limited perspectives. Bloated with their boodle, the English now squeal about aggression, and by the frequent repetition of a lie seek to inculcate the belief that they are the spokesmen of God, Christ and civilization themselves.

Twice they were pushed from this land—first in 1776 and again in 1814. But in 1914 we succumbed to a blood soaked boom which finally sent us to their aid across the Atlantic screaming about democracy and civilization. Our right to be an arsenal—a minister of death for Europe—had been interfered with.

But Europe and the West cannot survive another allied "victory" obtained at the expense of America, milk cow for a nation now sinking to the rank of a second rate power. For, as the allies are no longer self-supporting spiritually or financially, degeneration of institutions of the west would set in at an even faster pace. Nor can America long survive another campaign of race hate, witch hunting and the barbarism of another blood soaked boom, made respectable by unctuous phrases about humanity.

Prior to 1914, Russia with its vast territory moved eastward toward the Pacific until it was halted by the Japanese; it also pushed slowly westward into Europe by way of

the Balkans. Thus when Russia mobilized in 1914, Germany, sensitive to pressure from Asia, was confronted on the east by a Russia whose cossacks were expected to come thundering off the plains of Eurasia; and on the west by a France thirsting for revenge for the defeat of 1870. The fighting forces were already weighted against Germany. The time had come at last for the English, safe on their island, to try to destroy a strong rival, for, as the science based on centuries old work of all Europe spread to the peripheries of the world, they met an increasing competition for markets. Then like a coward they struck their [fol. 90] foe in the back, screaming hysterically meanwhile about Belgium. But stupefied by the loot of centuries, they failed to realize that weakening of a vital state such as Germany—from which they as the remainder of the world drew ideas for sustenance—would lead to the distintegration of Europe and the eventual collapse of their bloated domain.

In guarding the loot and pillage of centuries the islanders failed to bring about needed adjustments to a new age. Having acquired much of their territory by force—sustained by drawing on the cultural heritage of Europe—they now claim to be *the* representative of humanity—yea, the sanctuary of peace and freedom themselves. But when a nation attempts to hog the earth (and the sea as well) dislocations are produced which result in wars then stigmatized as aggression. Such a nation now prefers to absorb its victims slowly through the steady pressure of the semi-inert masses of former conquestions. Thus, resistance to change in the *status quo*, with the finger of guilt pointed at others, is "natural" for one gorged with territory yet to be digested. It is also natural considering its limited contribution to the culture of all Europe which it now claims as its own—that its Christianity is that of an overfed snake. The sickly screams about civilization which emanate from the stupefied islanders is, in fact, indicative of a diseased ego accompanied by an outflow of pus. Having fought for such a holy cause, even the most gullible democrat should be troubled by the inner state of affairs when, with sheeny-like cunning the islanders further extended their domain under cover of mandates, while at the same time helping to butcher Europe into a crazy quilt of buffer states—an incredible lack of understanding for a people who claim to be experts concerning

freedom (excepting, of course, for Ireland, India, the seas, and so on *ad nausea.*)

Europe packed into pieces, separated by economic frontiers, barriers of race and language, was endangered by the continued poverty of large sections of its population, as well as by the sterility and lack of leadership of the Allies. It was also faced on the east by the semi-asiatic peoples of Russia coming to consciousness of the science of the west; while at a gateway of Europe the islanders sought to sustain the semi-inert mass of their domains by turning the resources of the world in warfare against Europe, homeland of the west. Hence stern measures had [fol. 91] to be taken if the further degradation of the continent of Europe was to be prevented; its eventual overrunning by the masses of Asia prevented; and the diseased bungling of the "democracies" overcome—if, that is, the foundations of Europe, running deep into the centuries, were to be sustained.

Thus, the Germans—a people with a distinguished history who witnessed in 1914 the lust for blood of the peoples of the world, heard the arguments advanced for the invasion of Europe, and at a subsequent time witnessed the hypocrisy and falsity of expressed motives—have again risen to resist the brutalization and the impoverishment of the heritage of the west.

As a result the bloody bleeders who expected to bring the white death of starvation and the demoralization of revolution to others have been pushed back onto their hind legs on their island. After promising aid to Poland which never came, helping demoralize the Czechs, crying bravo the Finns, and trying to pit Russia against Germany, they are now running for holes in the ground—appealing meanwhile for help.

America's war psychosis helped to prevent a more stable resolution of world forces in the first world war: our entry prolonged the conflict, prevented a negotiated peace, and accentuated world revolution. Are we again to help bring disaster by obstructing the trend of world history?

Bequeathed modern science by Europe, after ten years of floundering we are still unable to get vital incentives to produce other than those engendered by mass hysteria (pep talks, shots in the arm) concerning invasion. Yet our real fear is of rival ideas, of the strain of adjustment to a new order, or the surrender of license, of competition

for markets (you would stifle the livelihood of others even though a continent lies before you for development), and above all a fear of retribution for a blood soaked boom. At the same time other dangers go unrecognized such as the cockney peril of White's Benedict Arnold Committee which would have us help cocknefy the world. Nor do you realize that degeneration would set in at an even faster pace with another allied "victory."

Isolation is a weasel word in the mouths of the cunning: no one thinks we are cut off from the remainder of the world. Do we not quiver in fear from even the invasion of ideas? And this is, you say, the land of the free and [fol. 92] the home of the brave. Craven ones—is your conscience bad? Perhaps you will soon shiver at your shadow. It is indeed a fatuous doctrine that we are qualified to interfere in European wars, after lying ten years prostrate, unable to manage our own affairs. Is it true we can only be enlivened by the prospect of another blood soaked boom?

Defense by offense: all possible aid short of war? Then you bring war to yourself. If you believe in fair play—if our frontiers are on the Rhine, then you will not object if Europe's are on the Hudson. And the Monroe Doctrine—you believe in it? What you mean is, we will invade the territory of others if convenient—but you, bad men, stay away from this fair land.

But there are terrible penalties for cowardice and brutality. You will not escape the consequences of your greed by sending airplanes. When respect for your integrity is gone, and the subterfuge of protection on the territory of others becomes prevalent, you will be an easy game for the invader. Even now you shiver at foreign ideas.

Americans—you are again being made prostitutes to a foreign power; by refugees and Jews for whom democracy means saving Jerusalem; by America secondists—whose pappies were born in England, and their sympathizers; by professors with inhibitions which go with a sedentary life and a suppressed lust for blood; by public men who divert attention from social deterioration within by engendering hysteria concerning foes abroad; by Roosevelt who would compensate for the inferiority of a crippled body by war against a vital people; and by Morganthau, representative of the holy people, who, to save Jerusalem, like a spider in a financial web would sell your birthright by

the manipulation of a stabilization fund and the granting of credits to a decadent empire.

Docile Americans—impelled toward your own subjugation—throw off your hypnosis! Stop whining about your "protectors," the English. Twice they were expelled; again they return, this time to appeal to your cowardice to save them from their degeneracy.

Free men—turn with disgust from the claim they are the sanctuary of freedom: full of the cockney they are like a cock crowing over an egg it thinks its own. Only by an enormous falsification can it be said that democracy is theirs. Even the gullible should realize by now that the stand by the Germans in the first world war against the tyranny of the masses of the world brought partial free-[fol. 93] dom to Ireland, the overthrow of the Romanoffs, and the lifting in the calculable future of the yoke from India.

A merging of our interests with the islanders (union now) is indeed a disgusting prospect: with the resistance to change which goes with vast bulk and old age, the dead weight of a now sterile empire is an obstruction to a more honorable world: a foreign body in a living organism.

Specialists in rear guard action (even in Libya they marched behind the Greeks)—they will desert you, as others, at an opportune time. Unwilling to meet in equal combat, they would destroy the unity of others, shrieking "aggressor" while doing so, if measure of self-protection are taken. Asking license for themselves while at the same time decrying the discipline of others as regimentation, their plea for help is that of the parasite and the sadist who fears retribution—not as they would have you believe—the voice of God.

Is this then to be a puppet state with a creed of hate. Can you be put again to the shameful use of an arsenal for a foreign power whose wars you do not declare or booty share? Are you as before to pour money into the maw of the British empire as into a rat hole, to sustain a decadent empire to which huge gifts have already been made by purchases of gold at an abnormal price?

Can you continue to strike at groups whose forefathers lived in warring countries without growing internal difficulties? Pious hope that the islanders' wars can be made our wars! A breach in American unity through the sup-

port of that special group will come. "Fifth columnists" as a result of the need to throw off the cockney menace will grow apace. Defence against White's Mass Murder Committee by all means short of civil war is on the way.

Americans, your vaunted free speech is already giving way to alarm concerning foreign ideas. Your internal collapse is viewed as an assault by others. Democracy is becoming a weasel word, a decoy duck for the retention of illicit gains: you would extend your license, not your liberty.

The American king of 'ogpu has a sweet name but it stinks nonetheless: to speak in the name of the Intelligence Service only makes the stuff more palatable. When given such a sugar coating it can be shoved down your throats with fewer wry faces: it may even be swallowed with gusto if a hand is raised in a salute to freedom. (Freedom to do as you please; not too proud to fight for the empire, etc.) [fol. 94] Your promises are worthless outside a restricted circle of ideas which no longer meet the world situation. Repudiation of debts, betrayal of others (Poles and Czechs), the progressive breaking down of respect for law by changing or evading them as soon as they are inconvenient (of which your repudiation of the Hague Convention of 1907 is an example), and the scuttling of solemn acts of congress by subterfuges of leaders whose promises you no longer take seriously, are indicative of your demoralization. Their infantile paralysis now spreads through your body, numbing the limbs and exciting the brain to inflict punishment on others for a deprivation of health for which they blame others.

The story told of the German people is one of badness, but the judgment to come of a people able to swallow such a dose will be one of degeneracy induced by the impact of ideas to which they were subjected in the guise of holy names.

The most vicious—and as to results the most brutal—persecutor of peoples is in fact the Jew. With a continuous scream his spokesmen now pour out streams of information infected with the distortion of his disgusting limitations. It is naive to expect that his fangs will not be pulled because attention is called to his "holiness."

Your freedom is a particular kind obtained by definition at the expense of others, by limitation of insight, for

ulterior purposes. Your output of information concerning the world situation is as before particularly vicious. Assassination of character is to many of your intellectuals as nothing, although they turn away with horror, so they think, at bloodshed.

You know by now that the freedom for which you fought was an illusion: Freedom to influence others through monetary channels, discriminative tariffs, blacklists, control of the seas, bottlenecks such as Gibraltar, and the blocking off of large thinly populated areas such as Canada; freedom for an international hog with the latent cowardice of the bully to bring the white death of starvation by blockade, to protect himself on other's territory, to betray small nations, to milk the hind state, America, and pollute the world's life stream by whining about Christianity.

And the source of infection for discriminations of race: Do you not by now know its source?

Men and women who do not believe in the brutalized [fols. 95-122] supremacy of force, mere size, material goods—turn with horror from the spectacle of the hog on land and sea claiming it is fight-for God, Christ and civilization.

Docile Americans, put aside your sanctimonious gush—your hysterical gabble about invasion—your cowardly fear lest limits are put to your greed.

You, successors to a blood soaked boom, enough of the falsity of your injured innocence. Do you not still believe in the victory of ideas and courage over massed brutality; do you not still believe in fair play? Arise then—be Americans. Let the island hog—gorged with the loot of centuries, sustained by the blood of adversaries sucked by an alliance with Jewdo*n*—collapse of its own weight.

There is no choice as you are taught between appeasement and war. The trend of events has long been out of control of your allies. You now have only the choice, as time will tell, of increased stability and safety for the West by a German victory, alternatively, of an accentuated world revolution which finally will swallow up the islanders, and with them America.

By an American who believed in the postulates upon which the nation was founded.

MOTION FOR DIRECTED VERDICT

And Thereupon at the close of the Government's case in chief the defendant, Elmer Hartzel, moved the Court to direct and instruct the jury to find the defendant, Elmer Hartzel, not guilty; but the Court overruled and denied said motion, to which ruling of the Court the said defendant excepted.

And Thereupon the defendants, to maintain the issues on their behalf, introduced the following evidence and the following proceedings were had:

* * * * * * *

[fol. 123] ELMER HARTZEL, one of the defendants herein, called as a witness on his own behalf, having been previously sworn, testified as follows:

Direct examination.

By Mr. Rankin:

My name is Elmer Hartzel. I reside at 21 West 110th Street, Chicago, Illinois. I am 51 years old and was born September 9, 1891, at Newcastle, Pennsylvania. My father's name was William Hartzel and my mother's name was Fannie Warnecke. My father and mother were both born on farms near Newcastle, Pennsylvania. Their parents were born in Kingston, Pennsylvania. My people have resided in this country since 1820. I received my early education at Grove City Preparatory School, Newcastle, Pennsylvania. I was born in the city of Newcastle and not on a farm. My father was a wholesale dealer in butter and eggs. I finished three years of preparatory school and then after a period of years entered college at Akron, Ohio, and graduated from there with the degree of Bachelor of Science in 1923. I started to work about 1909 in Pittsburgh, Pennsylvania, with my father and I was with him until 1915 when I went to work at the railroad yards. I wanted to be a railroader and at the time of the outbreak of war in 1917 I was working for the Pennsylvania Railroad as a switchman. I was then in Youngstown but went to Pittsburgh about the time of the outbreak of the war. I called up the Marines and asked if I could get immediate service abroad. I didn't get into service with the Marines. I heard that the Uni-

[fol. 124] versity of Pittsburgh was forming a unit to go abroad and I applied there. They did not have a full quota and I was accepted in May 1917. My number was 10,500. I went over seas in September 1917 and landed in England. Between May and September we were at Allentown, Pennsylvania, awaiting shipping orders and taking training. We were sent to England and I was in service overseas for 18 months and returned to this country in April 1919. I was honorably discharged April 1, 1919. I saw service in the Medical Corps at Angers where I did X-ray work. I was a candidate for the Artillery School there but the war ended before I was accepted. After I was mustered out of service I went on a short vacation and went to Akron, Ohio, and worked for the Goodyear Tire and Rubber Company. I was in the production control department and saw that material flowed through the factory in an orderly manner and in the quantities they wanted. I left there and went to work for the Akron Health Department and received permission from Dr. Nesbitt of the Department to do college work and entered the University of Akron. I was with the health department until the depression came at which time they left off the youngest member of the staff, which was myself. I was with the Health Department about two years. I graduated from the University of Akron with the degree of Bachelor of Science in September 1923. I then went to Chicago and entered the University of Chicago where I took under-graduate work and was at this University until the end of 1926. I majored chiefly in economics, and Political Economy. I did not receive a degree. After I finished at the University of Chicago I went to work for the National Bank of the Republic, at Chicago where I was employed as financial statistician, that is a statistical man and investment adviser to the bank which later became merged with the City National Bank and Trust Company. I was there until the end of 1927 when I went to New York to get some additional financial training. I was employed there by the Fitch Company, a publishing company and financial analysts which compiled financial reports for the Analyst. I was there five months but came back to Chicago because I had left a girl behind me. The girl is now my wife and is here in the court room. When I returned to Chicago where I wrote articles for the Chicago Journal of Commerce

for a magazine they publish called The Economist. After [fol. 125] that I obtained employment with the Kissell Company, an investment banking firm which had its main office in New York City. This was in September 1928 and I remained with them through the financial crash and until the end of January 1931 at which time their Chicago office was closed. Not being able to obtain satisfactory employment, I stayed home writing periodical articles which I subsequently published. I later obtained work with the Department of Mines and Minerals of the State of Illinois but due to the economy program, that job was legislated out. I then obtained employment with the Fernandi Company, investment brokers in Springfield, Illinois. That firm was dissolved and I returned to Chicago early in 1934. From 1934 until 1936 I worked at various jobs including one with the Cook County Bureau of Public Welfare, doing statistical work there at the stockyard station. I also worked for the University of Chicago in their library. Having received a bonus from the United States Government because of war service, I did part time work in the Department of Philosophy at the University of Chicago. I majored in philosophy and science. I also worked for Enyard, VanCamp, an investment company on LaSalle Street where I was assistant to the partner. He wanted some financial assistance in order to float some stocks and bonds. This firm was a partnership and was partly dissolved, at which time I left them. This brings us down to 1938. During the interim I passed several federal and state examinations—civil service examinations and took work in the Division of Unemployment Compensation of the State of Illinois doing statistical and auditing work. They were located in the Merchandise Mart. During this period I did a lot of research work some of which was published and some of which was not. For instance, I wrote one for the Harvard Business Review, one for Time in 1935, one for the University of Chicago which was published in the Journal of Business. I did two articles for the Accountant's Review, published by the Association of University Accountants and I wrote an article for the University of Southern California. I had passed numerous civil service examinations given by the Federal Government for work as a financial economist and other work of that character and was on the list for assignment. In 1941 I was called for work

in the auditing section of the United States Army Air Corps in the civilian branch. I didn't apply for that work [fol. 126] but they called me for it because of the emergency and I was assigned to Detroit, Michigan, to work in the Packard Plant which I did until November, 1941, when I returned to Chicago to do personnel work at the Buick Motor Plant in Chicago. I did auditing the same as at the Packard plant in Detroit to see that costs were kept according to required accounting procedures. There was a personnel of 5000 employees. In February 1942, because of a change in the regulations regarding account work some of the personnel was removed from the Buick plant and I was assigned to the Pullman Car Manufacturing Co. located at 103rd Street in South Chicago where I did the same kind of work, that is auditing the books of the company, verifying the accuracy of the records, etc. I remained there until my incarceration on September 6, 1942. I was arrested at 1:00 o'clock on Sunday at my residence at 21 West 110th Street, Chicago, Illinois. I had lived there about four months. I left some of my personal belongings at 149 South 14th Street in Maywood because I could not obtain satisfactory quarters. We were only able to obtain a one-room apartment so we left several trunks and a number of boxes with our friend, the man who testified here.

I also wrote some articles concerning the candidacy of T. P. Smith who was then running for Congressman at Large in 1940. There were about 200 copies of the article which were sent chiefly to newspapers downstate. I wrote another article called "Revolution will come to America" in January 1941 and about 200 copies of that were sent to some newspapers and others. I wrote the article "The President's Illness" in April or May of 1941. I had 200 copies mimeographed and sent them to a number of representative people. I had a mailing list which I first began to compile when I thought I saw war coming and that is the time I wrote "Revolution will come to America." I obtained the names of some prominent people and newspapers and others whom I thought might help keep the war from coming here. I finally had a mailing list of 750 names. But at no time were more than 600 documents sent out. They were chiefly sent to prominent people and a large portion of them were sent to Congressmen and other representatives, and some at least were sent

to senators. The type of people who oppeared on my mailing list ordinarily were prominent, representative people. As time passed, I began to eliminate a number of [fol. 127] representatives and senators. Out of the almanac I obtained names of patriotic societies such as Daughters of the Revolution, We the Mothers Mobilize, in short a list of which I considered to be patriotic organizations. That includes the names of fraternities, sororities and organizations of that type and the Natoinal Committee of America First and also Frank J. Loesch, the man whose name was mentioned here and a number of bishops and representatives of churches.

I first met Mr. Soller in May of 1941 at 800 West North Avenue on the second floor. He was associated at that time with Mr. Hahns Reichel who ran a foreign travel agency. The people who had been doing my work had not been doing satisfactory work and one of them had gone out of business. I wanted someone to do my work who would be near my place of employment in the Merchandise Mart. I read in the paper about the German-American Alliance which I thought was a kind of trade organization and which I thought would be opposed to Communism and who might be opposed at that time to war against Germany. We were not in war then and I went to the German-American Alliance and asked if they knew of someone who could do competent work and they referred me to Mr. Soller, having received some of his advertising material. This was in May 1941. I went to see Mr. Soller immediately. I did not, at that time, have any articles to be mimeographed. I merely asked if he would be in a position to do some work for me. I next saw him a couple of weeks later between then and July 15, when I left for Detroit. The first piece of work he did for me was in May 1941 and was called: "The President's Illness." I received it and paid the usual rate. The next article was done in September 1941. I called him from Detroit and said I would send him a manuscript, which I did. That article was called "The Blood Sacrifice" and it was delivered to me by express and paid for at the usual rate. The next article was in May 1942 after I had returned to Chicago. There were two articles. One concerned the British and one concerned Jewry. "The British an Inferior Breed" is the one I refer to and the other was "The Jew Makes a Sacrifice: The Forthcoming Collapse of America." They were short

and intended to be complementary to each other and to go out in one mailing. I received the finished work three or four days after I mailed the manuscript and sent copies [fol. 128] to the people described in my mailing list. I sent out about 600 copies and addressed the envelopes myself on a typewriter I had purchased and which was shown here. I paid for the stamps. Mr. Soller did another article in July or August of 1942 called: "The Diseased Spinal Cord," the title of which was worse than the contents. I received that work from Mr. Soller at the corner of the public library at Randolph and Michigan Avenue. He gave me the material and I gave him the usual payment. I had previously made arrangements with him to meet me there. I could not very well make the trip from the south side to his office. I had moved to the south side and it was more convenient for me to meet him at that place because of the connections between the elevated and the Illinois Central at that point. The amount of the bill was $7.00 which I paid. I had a conversation with Mr. Soller. He asked me what I was doing at the library and I told him it was for my convenience. He also asked me what I was doing with this material and I told him I was mailing it to Congressmen and Representatives including Brooks, Green and other men of that type.

Mr. Rankin: Mr. Hartzel, you have been charged here in the indictment in this case with having unlawfully, wilfully, knowingly and feloniously obstructed the recruiting and enlistment in the service of the United States, by sending out this document called, "The British an Inferior Breed," with the intention to induce persons available and eligible for recruiting and enlistment in the military and naval forces of the United States to fail and refuse to enlist for service and to induce such persons liable for military and naval service of the United States under the provisions of the Selective Service and Training Act to refuse to submit to registration and selection for said service provided by the law; I will ask you, did you have—in the mailing out of those articles and in constructing them, did you have any such intention?

Mr. Hartzel: No, sir, I never did. I have been in the service myself, and I thought it might improve their morale, or indirectly that of the public at large.

Mr. Rankin: You are charged in Count 2 of the indictment with unlawfully, knowingly, wilfully and feloniously causing and attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, by sending out those articles, intending to cause insubordination, disloyalty and mutiny, [fol. 129] and refusal to do duty in the military and naval forces of the United States, to the injury of the United States; I will ask you if you had any such intention in mailing out those articles?

Mr. Hartzel: No, I had never conceived it in that way; my efforts, I thought, were political in character.

Mr. Rankin: You are likewise charged with sending out articles, this article, "The Jew makes a Sacrifice: The Forthcoming Collapse of America" and ask you whether or not you had any such intention as was charged in the first and second count here in sending out those articles?

Mr. Hartzel: No, sir, as an American I did not.

Mr. Rankin: And the same that I have mentioned that was charged in the first and second are charged in the third and fourth, and your answer would apply to the third and fourth count under the same circumstances?

Mr. Hartzel: Yes, sir.

Mr. Rankin: Now, the fifth count—what was the name of that?

Mr. Connor: "The Diseased Spinal Cord."

Mr. Rankin: In count 5 and in count 6, you are likewise charged with sending out an article called "The Diseased Spinal Cord." Now, I will ask you whether or not you had any such intention in sending out that article as I have asked you here?

Mr. Hartzel: I certainly did not.

Mr. Rankin: Will you state to the court and jury what was your intention then in writing and distributing those articles?

Mr. Hartzel: I always regard my work as from a statistical standpoint and business, and also taking the war aspect, I thought there was a trend toward Communism, and I thought it was quite a dangerous position because of warfare between the white races, it would be the cause of war between the white and yellow races, and rather than have it beat into us, we might as well face the facts and know what we were facing, a certain group of Communists discussing methods, their viewpoints, I wanted to help minimize that

so we could again have public standpoint established in this country. I am not in here because I was disloyal, and I have no prison record, but because the Communistic question is beginning to get in here and will cause the disappearance of this court, and the absorption of the executive branches [fol. 130] otherwise of the government, the disappearance of the things that I was trying to work toward.

Mr. Rankin: You are charged with having conspired in this matter with Mr. Newell Mecartney and with Mr. Elmer Soller unlawfully, wilfully, and knowingly, feloniously, combining and confederating, agreed together with each other or with other persons to this grand jury known, to violate the provisions of Section 33, Title 50 of the United States Code, to commit certain offenses wilfully, by causing and attempting to cause insubordination, disloyalty, mutiny, refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States, by preparing, publishing and circulating these documents, distributing and disseminating them in the Northern District of Illinois and elsewhere throughout the United States, various documents, like the articles which are mentioned and specified in the other counts, and causing or attempting to cause insubordination, disloyalty, mutiny, refusal of duty in the military and naval forces of the United States, the United States being at war, to wilfully, obstruct the recruiting and enlistment in the service of the United States, by preparing and publishing these articles and documents aforesaid, and intending to induce persons available and eligible for recruiting and enlistment in the military and naval forces of the United States to fail and refuse to enlist for service therein, and inducing persons who would be liable for military and naval service in the United States under the provisions of an Act of Congress not to enlist, or to destroy or injure the military services; I will ask you, did you have any such conspiracy or arrangement or agreement with Mr. Soller or Mr. Mecartney, or any other person?

Mr. Hartzel: I did not. I was completely alone. Not Mr. Mecartney and not Mr. Soller—if I would have had a typewriter myself, I would never have contacted even Mr. Soller.

Let me say parenthetically that what you see here in the exhibits indicated here that I was spending most of my time at such work which is untrue because I was fully

employed and only a small part of my time was in this endeavor, and I listened to none of those foreign broadcasts. I read a book written by a college professor concerning anti-Semitism, a book by Professor Coffin, concerning "Perish the Germans," in which he advocated that [fol. 131] seventy million Germans should be exterminated, and be sterilized. But to go back to the question, I was completely alone and wanted to be.

Cross-examination.

By Mr. Connor:

Regarding my first contact with Mr. Soller I went to the German-American National Alliance for reference to someone to do my mimeographing work because the people who had been doing my work were not doing first-class work, one of them had gone into war work and as I was working in the Merchandise Mart, I wanted someone nearby to do the work for me. It so happens that 800 West North Avenue is not very far from the Merchandise Mart and you can go there on the elevated in three or four minutes. I had another purpose. I wanted to get somebody—we were not at war then, who might be non-communist and opposed to the trend toward communism. I had no intent to do anything or any of the things charged in the indictment or to undermine the morale of the armed forces. I sent the documents out anonymously because I almost lost my job several times and I knew I had to be careful and also because of a great deal of espionage in the community. I did not sign my name to the documents I sent out for the same reason. When I wrote in the Harvard Business Review, the Chicago Review and the Chicago University Review I signed my name. I wanted to get my mimeographing done closer to my work but I telephoned him from Detroit because I knew the man did careful work and he knew what I wanted. As I explained before, in addition, I wanted someone who would be adverse to war with Germany, we not being at war at the time and who might be opposed to the trend toward Communism within America. I never inquired as to Mr. Soller's attitude on this point. Regarding the articles charged in the indictment, those were mailed in Chicago. I took them out and dropped them in several boxes. I did that because with such a large quantity of them, I thought someone might

throw them out. I mailed them all at once, but I dropped one hundred in one box and another hundred in each of four or five boxes. I didn't put them all in one box simply because, if someone would throw one out they would throw them all out. I had a suspicion that someone in authority might well find these articles and throw them out for the reasons I gave you. I had heard that fingerprints would [fol. 132] be identified so I put my hand over it like that (indicating). I was suspicious of it for the same reasons I gave you. I did not try to smudge the fingerprints, I merely put my hand like that as I have shown you. The purpose of mailing these documents was not to improve the morale of the troops. I have read the last six paragraphs on page 2 of Government's Exhibit 21A and I think this, insofar as effect on the morale of the troops is concerned, that the troops ought to know, and the country also, and the country at large, the consequences of war. I think the effect on the troops of saying that America was betrayed would be for them to consider whether it was or not and if so, to fight for Americans. I think America was betrayed by Jews within America who had been delegated to work that up, one was the Jews and the other was the British. I have read the Declaration of Independence and I consider it a mighty document. I am an American.

The sentence "The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves" referred to a book that told of seventy million Germans to be sterilized. It is a leader's doctrine for Christians. I mean by that, when we acquire and support the objectives of war. I did not mean that if America continued its fight in this war, the miseries and things that would result from war would be back on us, I meant you would have to reconsider the objectives. By "a stench from rotting carcasses of those who would again invade Europe" I meant Americans. I am opposed to Americans and British invading Europe. I am opposed to the objectives that this country has announced: policing others and taking a totalitarian doctrine and applying it to those they condemn. I was opposed to America's entrance into the war.

Redirect examination.

By Mr. Rankin:

I know of many others who were opposed to our entering into the war including very prominent Americans. Colonel Lindbergh is a great American. General Wood and Senator Wheeler are staunch Americans and men whose integrity and Americanism cannot be doubted. After America entered into the war I never did anything to stop or oppose the military service in any way or the operations of the War Department. I never denied to the F. B. I. that I had written these articles or rather, I did not affirm or deny it.

[fol. 133] MARY HARTZEL, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Short:

My name is Mary Hartzel. I live at 21 West 110th Street. I was employed until the trial started but quit because I was ill. The defendant is my husband and we have been married about three years. We live on the second floor at that address and have been there about five months. I don't know anything about the writing of these pamphlets. There is a bathroom at the building right next to our apartment. I saw one of the special agents go up there and take a package from under the bathtub. I knew it was there and saw it when I was cleaning the bathroom. I did not know anything regarding it or when it was put there or by whom. I never found out what was in it and except what I have heard here I don't know what was in it. We formerly lived in Maywood but moved about the 7th of November 1941. I have lived in Chicago twenty years. My husband and I were married in Chicago. I knew him about fifteen years. He has never been in any trouble before, that I know of. We left some of our trunks and some boxes with books and other things in Maywood when we moved to our present address because we have only a one room apartment and did not have room enough for everything. We did not conceal them in any way. All I

know about this case is what I heard in this court room. I never saw Mr. Soller before ths trial. This is the first time I ever have had the experience of being a witness in court.

(Proceedings of January 13, 1943, 10:15 o'clock A. M.)

Thereupon Court and counsel retired to chambers and discussed the type, form and substance of the instructions to be given by the Court to the jury and considered by Court and counsel as necessary and proper under the circumstances.

Thereupon counsel for the defendant Hartzel requested that the Court instruct the jury in substance: that the things alleged in the indictment to have been done by the defendants in the matter of alleged interference with the enlistment and recruiting service and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but that the defend- [fol. 134] ants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific intention accompanied said acts.

And thereupon the attorneys for the several parties made their respective arguments to the jury:

INSTRUCTIONS TO JURY

Whereupon the Court instructed the jury as follows:

The Court: Ladies and gentlemen of the jury, it now becomes my duty to instruct you on the law in this case. This indictment——

A Juror: May I ask if it is permissible to take notes on the instructions?

The Court: I will ask counsel.

One of the jurors asked if it is permissible to take notes on my instructions. I would like counsel to step inside and state whether they are agreeable to that.

Mr. Connor: I have no objection.

Mr. Short: I don't care.

Mr. Connor: Do you object to the juror taking notes?

Mr. Powers: Not at all, no.

The Court: Mr. Rankin?

Mr. Rankin: Give him a piece of paper.

Mr. Short: Is there any objection?

Mr. Rankin: I agree to give him a piece of paper, your Honor.

The Court: Give him a piece of paper, then.

Mr. Rankin: All right.

The Court: There is no objection to taking notes, if you wish.

[fol. 135] Ladies and gentlemen of the jury, this indictment is brought under Sections 33 and 34 of Title 50 of the Statutes of the United States.

Now, Section 33 provides that whoever, when the United States is at war, shall wilfully cause or attempt to cause, *willfully cause or attempt to cause* insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States—there are two parts—who shall wilfully obstruct recruiting or enlistment in the services of the United States to the injury of the service of the United States shall be punished.

Then Section 34, I will refer to later.

This indictment, as you have been told, consists of seven counts. Six of the counts are on the particular publication, the first count referring to the publication, "The British An Inferior Breed," says that the defendants caused to be published and disseminated and that they well knew that it was calculated and intended by the defendants to induce certain persons available and eligible for recruiting and enlistment in the military and naval forces of the United States to fail and refuse to enlist for service therein, and to induce persons liable for military and naval service of the United States under the provisions of the said Selective Training and Service Act, as aforesaid, to refuse

to submit to registration and selection for such as aforesaid.

The second count charges publication and dissemination of that document, and says that the defendants then and there well knew said document, writing and article was calculated and intended by the defendants to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to the injury of the services of the United States, et cetera.

Now, that is the indictment, and as has been stated to you, this indictment is no evidence of guilty and should not be considered by you as any evidence that these defendants are guilty; it is simply a charge that is brought against them, and you are brought here to determine whether the accusations or the charges are just, that is, whether or not the defendants are guilty of the charge; but you are not to assume that they are guilty of the charges simply because they are here, because there is an indictment here and because there is a trial here. These defendants come into court clothed, as the language is commonly used, clothed with the presumption of innocence. [fol. 136] As they stood before you when you were impaneled and sworn to try this case, as they stood there before you, they were presumed to be completely innocent of the charges brought against them, and that presumption should stay with them, with any defendant brought to trial, throughout the trial, unless and until the jurors are convinced by the evidence beyond a reasonable doubt that they are not innocent of the charge and are guilty.

If you can reconcile any doubt in the evidence that has been produced here with the theory of innocence as well as with the theory of guilt, you will so reconcile it with the theory of their innocence and find them innocent, as I said, unless you are convinced beyond a reasonable doubt that they are guilty of the particular charges against them in the indictment. That doubt, of course, as the term implies, must be a reasonable doubt, a doubt founded upon reason and arising from the evidence, the legal evidence in the case, and does not mean mere speculation or conjecture as to some possibility, but, as the term implies, it is a doubt founded upon reason, a reason that you find from the case, the evidence in the case, from the legal evidence given, and unless such doubt does arise, unless the evidence is such

that no such doubt does arise, it will be your duty to return a verdict finding these defendants not guilty.

Now, as I read to you from the indictment, they are charged with causing certain documents to be prepared and disseminated with intent to interfere with the enlistment in the armed services of the United States and recruiting and intending to cause insubordination.

You will determine from all the evidence in the case, first, as to each individual defendant, whether he is guilty of participation in causing the publishing or causing the pamphlets to be published.

If the evidence does not convince you as to any defendant that he participated in the publishing or causing the pamphlets to be published and disseminated, that ends the case as to such defendant, because then there would have to be a finding of not guilty.

Then as to each defendant, you must find these facts before you could return a verdict of guilty: It is charged that these pamphlets were calculated to cause interference with the enlistment and recruiting and were calculated to cause insubordination or disloyalty. If they were calcu- [fol. 137] lated to cause or interfere with enlistment or were calculated to cause insubordination, they would not have to be calculated to cause both, but at least one.

Now, it does not make any difference ordinarily what anyone may think about any race or people. One may be anti-Semetic or may be violently opposed to anti-Semetism, but he has a right to his private opinion. Ordinarily he has a right to express that opinion, and his opinion may be hateful to people, to other people, but he cannot be imprisoned because his opinion happens to be hateful to other people. He may not like the President of the United States, and he may like the President of the United States, and think the President can do no wrong, or he may hate the President of the United States and think the President can do nothing that is right. That is not the question in this case what individual opinions are. There is just this limitation, so far as this case is concerned: One the question of right of free speech with reference to the President or the people in charge of the administration of our affairs, the affairs of war, and that is, they are prohibited by this statute from any expression of opinion calculated, or which would likely have the effect of interferring with recruiting or enlistment or which would cause insubordination in the

army. Now, the two things must concur, and it must appear that the publication was calculated to have that effect, and that the defendant intended it to have that effect.

Now, you are to determine whether the publications were calculated to have that effect from the publication itself, it is for you to determine whether these publications, the language used in these publications, was calculated to have that effect, and then you will have the question of intent. I might say in this connection, I might, in describing the limitations on free speech, I might use the language that was used by Justice Oliver Wendell Holmes: He said: "The question in each case is whether the words used are used under such circumstances or of such a nature as to create clear and present danger that they will bring about the effect that Congress has a right to prevent."

That is the rule that you must apply in determining whether these publications were calculated to have that effect, as to whether the words used in these publications are such, or were used under such circumstances or were of such a nature as to create a clear and present danger that they would interfere with enlistment or recruiting or [fol. 138] would cause insubordination in the army, because then they are prohibited by the statute that I have read to you.

Then there is a question of intent. It is charged in the indictment they were intended to produce those results. In determining whether they were used with that intent, you will take into consideration all of the circumstances in the case, and you must take into consideration the words used, and whether from the words used themselves you could find that there was such intent, and you are at liberty to infer that, to take into consideration the language used, the intention and the probable result of such language used, you are at liberty to infer that from all of the facts and circumstances that you have heard testified to here in the evidence, the circumstances under which they were issued.

There is one other thing that you must consider. Now, another thing which I will refer to just now, some other documents have been admitted in evidence in this case that are not referred to in the indictment, the documents, I believe, that were issued before this war started, before December 8, 1941, and it was not criminal then to publish any such documents even though for any purpose. The statute that I read to you refers to activities when the nation is at

war. Those are admitted in evidence, not as proof that the defendants were guilty of any acts or violation of the statute in publishing them at that time but simply on the question of whether you believe from the fact that they issued such documents and had expressed such opinions at the time when they issued these documents, the documents in question here, mentioned in the indictment, whether, when they issued those documents, they intended to interfere with enlistment and recruiting in the service or cause insubordination or disloyalty to the army.

I might say here, testimony was given as to statements made by Mr. Soller to the F. B. I., and statements made by Mr. Hartzell and statements prepared and made by Mr. Mecartney, referring to the other defendants in the case. Now, what Mr. Hartzell has said outside of court is evidence only against him, and that is not evidence against the people that he talks about or against the other defendants in the case, only as against him.

Statements made by Mr. Mecartney outside of the courtroom in which he mentions the other defendants are not evidence against such other defendants, they can only be [fol. 139] received as evidence against him and be considered as such, if you feel they are evidence against him.

Statements made by Mr. Hartzell about other defendants are not evidence as against those other defendants. However, any statements made by any defendant here on the witness stand about any other defendant in the case may be taken as evidence against such other defendant, if you feel that they are, from all the circumstances in the case, that they are evidence against such other defendants.

In considering the effects of the pamphlets, you may take into consideration, of course, the fact that the nation is at war now and is engaged in recruiting men for the military and naval services and that we have men in the army. I will say to you that it is not necessary to show that any person has been injured by these documents, it is not necessary for the government to show that. The charge is that the defendants published and disseminated these documents with the intent to interfere with enlistment and with an intent to cause insubordination. That is the question for you to determine, not whether any person actually was injured, but whether the publications were issued for that purpose and with that intent and were calculated to have that effect.

When the statute speaks of obstructing enlistment or recruiting, it does not mean preventing, it means that it would hinder or delay recruiting. Obstructing does not mean preventing, as it is used in this statute.

The military force includes all persons designated by statute as subject to be called into active service and does not mean simply a man in the armed services.

That brings me to the conspiracy count of this indictment. I think I have covered everything in my notes that are not on the question of conspiracy. I will ask counsel later on whether there are any matters that I have overlooked, later on in chambers.

In the conspiracy charge, it is charged in this indictment, Count 7, that these defendants conspired together to publish, prepare and publish and disseminate these documents with the intent indicated in the prior counts.

It is not necessary, to constitute a conspiracy, that two or more persons should be together and enter into an explicit and formal agreement for an unlawful scheme, or that they should directly, by word or in writing, state what the alleged unlawful scheme was to be and the details of [fol. 140] the plans by means of which the unlawful combination was to be effected. It is sufficient if two or more persons, in any manner or through any contrivance, come to a mutual understanding to accomplish the common and unlawful design charged.

The members of a conspiracy need not necessarily know all of the other members of the conspiracy. Of course, it is necessary that they should know some of the members of the conspiracy, but they need not know or be acquainted with or have knowledge that other members who are later members of the conspiracy were in the conspiracy.

A person may enter a conspiracy after it has been formed and before its final completion and assist in carrying out the conspiracy, and thereby be a part of such conspiracy even though he was not a member of such conspiracy at the time of its inception. By the giving of this instruction, the court does not mean to express any opinion as to whether there was or was not a conspiracy in the case at bar.

Now, you will determine from all the evidence in the case whether there was such a conspiracy as is charged in this indictment. If there was a conspiracy, there is no guilt unless some overt act is done toward carrying out the

conspiracy. It is charged in the indictment that certain overt acts were done with reference to carrying out the conspiracy and in pursuance of the conspiracy.

Now it is not necessary that the government prove that all of the overt acts were done; it is sufficient if it is shown they conspired and that one or more of the overt acts was performed in carrying out the conspiracy. I will say to you that it is not necessary that an act in carrying out the conspiracy be an overt act or criminal act in itself, for example, in a mail fraud case, if one carried on a fraudulent scheme, if it be carried on through the mails, it would be an overt act, the carrying out of the conspiracy would be putting a stamp on the envelope and sending it through the mail. An overt act may be innocent of itself, but if it is an act which is calculated to carry out or to effect the conspiracy, then it becomes an overt act.

As I said to you in the beginning, and which I think I should repeat, before you can find the defendants guilty, you must find from the evidence beyond a reasonable doubt that they are guilty from the evidence which you have heard or the lack of evidence or failure of evidence, that convinces [fol. 141] you beyond a reasonable doubt that they are guilty.

COLLOQUY OF COURT AND COUNSEL

Now, I will go back in chambers and I will ask counsel whether or not you have any further suggestions.

Whereupon the following proceedings were had in chambers, outside the hearing and presence of the jury:

The Court: Now, I want to see if I have overlooked anything here, any matters that I may have overlooked that you want me to give instructions on.

Mr. Powers: I don't think of any, your Honor.

Mr. Rankin: Judge, you started several times on the intent, but you never finished that to my satisfaction.

The Court: I thought I did.

Mr. Rankin: You said the clear and present danger, that was all right, and you said something about the intent.

The Court: I will tell them that they must prove the intent, if I didn't.

Mr. Kelly: I think you went into that very thoroughly, your Honor.

Mr. Connor: I think, if your Honor emphasizes it again——

The Court: I will say that I didn't make that clear, I am just making it clear then.

Mr. Connor: All right.

Mr. Rankin: I thought that last comparison you made was unfortunate, as to putting the stamp on the envelope, because here we have a question of mailing out of this stuff, and the very thought of putting a stamp on the envelope might indicate to the jurors' mind an overt act which would stick anybody.

The Court: I will tell them that that was just an illustration, it is not charged here that that was an overt act.

Mr. Rankin: Now, you mentioned an overt act, and I don't know whether these jurors know what an overt act is.

The Court: I said the overt acts were charged in the indictment, and they would have to prove the overt acts, or one of them.

Mr. Rankin: But do they know what an overt act is? That is the legal proposition.

The Court: Well, they charge that these defendants did certain things that were overt acts, and I think everything charged in there would be an overt act. I said they have got to prove them.

[fol. 142] Mr. Rankin: But does the jury know what an overt act is?

The Court: Well, I said that they must prove the overt acts. The indictment sets out certain overt acts. They don't need to have a definition of an overt act.

Mr. Rankin: All right.

The Court: I will say that.

Anything else?

Mr. Rankin: Well, yes, your Honor, one thing, maybe it may seem inconsequential but in connection with the statements, the statements made out of court——

The Court: Were not evidence against anybody.

Mr. Rankin: Now, there were certain statements here and I was just wondering as you stated that whether the jury might think that that was all right as to what persons said out of Court.

The Court: I will say that it includes written statements.

Mr. Rankin: That is what I say. I might say, I was pleased with the explanation or the expression about Judge Holmes.

Mr. Powers: You are referring to pamphlets sent out of a similar type as in this indictment, you made some statement, that there were pamphlets prior to the war that were sent out, written by these people, and I was wondering—whereas Mr. Mecartney's stuff was received by him apparently, it was not sent out.

The Court: You are correct, I didn't say anything about receiving.

Mr. Powers: There is an inference about sending them out.

The Court: I had that in my notes, but I didn't give it.

Mr. Rankin: My client remarked to me as we came in here, something about eighteen and sixty, as to the draft age, or something like that, with the thought, I suppose, that it would be sent to mature persons.

The Court: Everybody who testified to getting pamphlets here were between eighteen and sixty, in the draft age.

Mr. Kelly: That is right.

Mr. Rankin: I couldn't quite see the significance of it, but he seemed to see something.

The Court: Now, what does the government have?

Mr. Kelly: On that instruction with regard to the presumption of the consequences, your Honor——

[fol. 143] The Court: I told them that they were at liberty to infer.

Mr. Connor: While we are going over this, I don't see anything wrong in this one here (indicating).

The Court: I don't think I will go back over that.

Mr. Finn: There has been no directory instruction by the government on this question, on the question of intent, there has been no directory instruction.

The Court: I told them in determining the question of intent that they should take into consideration all the circumstances in the case and take the language used and the theory which may be inferred that the defendants intended the probable consequences of the language.

Mr. Rankin: I thought that was a little more liberal than the government was entitled to.

The Court: I think I stated it to the jury.

Mr. Rankin: If you make a statement with reference to the specific intent, the particular intent, whatever you want to call it, I will be satisfied with it.

The Court: With what they have here?

Mr. Rankin: No, but satisfied with what has been done.

The Court: I said I was going to give that.

Mr. Rankin: All right.

Mr. Connor: On the question of the military service, I think you covered the military service pretty well, but I was just wondering if you would care to read this one here; you might enlarge on the definition of the military and naval forces.

The Court: I said the military and naval forces includes not only men actually in the army and military forces but all persons subject to.

Mr. Connor: Did you say Selective Service Act?

The Court: Yes.

Mr, Connor: That's all right, if you said that.

The Court: I think I did.

Mr. Kelly: If the court please, you say clear and present danger. I don't want to argue with your Honor, but it seems to me that that language is in a dissenting opinion.

The Court: No, it is in his own opinion, in the court's opinion. That was said in the court's opinion.

Mr. Rankin: That was in the Shenk case.

The Court: Yes.

Mr. Rankin: Where there was a full court.

The Court: There was no dissension in that case.

[fol. 144] Mr. Rankin: No. The Shenk case has never been overruled.

The Court: That is a criterion that is used time after time.

Mr. Connor: What are you going to do on the question of intent? Are you going to give further instructions on that?

The Court: Yes, I said I would.

Mr. Connor: I think you have done all right.

The Court: I will instruct them practically as I thought I had before, that the intent must be proven, and that if it is not proven, that they cannot find the defendants guilty. I will tell them, in determining whether there was an intent, they must take into consideration the facts and circumstances in the case, the nature and character of the language

used in the pamphlets, and they are then at liberty to presume the defendants' intent.

Mr. Rankin: Not to presume, to infer.

The Court: Well, at liberty to presume, at liberty to presume that the defendants intended the probable and necessary consequences of the words used.

Mr. Kelly: I think you covered that, Judge.

The Court: I am going to tell them that counsel thought I did not instruct fully on the question of intent.

Mr. Connor: We didn't.

The Court: Well, I won't distinguish.

Mr. Connor: Don't you think in going over it and repeating it that you unduly emphasize it?

The Court: No, I am going to tell them that some counsel thought I did not instruct fully on that.

Mr. Kelly: Except for this one juror who has to take notes, he took very copious notes, your Honor.

The Court: Well, he is not a shorthand reporter. I don't think it can do any harm.

Are there any exceptions that the parties desire to take to any part of the instructions?

The statute says it shall be done. I don't want that done in the presence of the jury, and I would like to wind this up.

Mr. Rankin: With the exception I would like to note, Judge, is with reference to that statement of——

The Court: You me-n at liberty to presume?

Mr. Rankin: Yes, and the probable consequences, that part of it. We fought that out here before.

[fol. 145] The Court: Yes, we fought that out here before. You have your exception.

Mr. Rankin: Yes, exception to it.

The Court: All right.

Whereupon the following proceedings were had in open court, in the hearing and presence of the jury:

ADDITIONAL INSTRUCTIONS TO JURY

The Court: It was thought by some of the counsel that I did not instruct you fully on the matters that are charged in the indictment.

It is necessary for the government to prove that the defendants intended to interfere with the enlistment and recruiting services and intended to cause insubordination.

I thought I covered that, but if I did not, that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used.

Now, with reference to the illustration of putting a stamp on a letter, I did not mean, and it is not charged here as being an overt act, putting a stamp on the letter. That was simply an illustration of what might constitute an overt act. An act to be an overt act in pursuance of a conspiracy need not in itself be a criminal act if it is an act in pursuance to effect the conspiracy, for the purpose of effecting the conspiracy.

I said something to you about the statements made by an individual defendant, statements made out of court, made by an individual defendant in which he mentions other defendants; that was not to be taken as evidence against that other defendant. I include in that the written statements taken in the F. B. I. office, any statement, whether in writing or a statement made by one of the defendants out of court is not evidence against any other defendant.

Then in reference to the question of persons subject to enlistment, or persons subject to enlistment under the Selective Service Act of the United States, it includes persons from eighteen to sixty.

Now, ladies and gentlemen of the jury, I will have to give you your forms of verdict yet.

First, as to Elmer Hartzell, if you find the defendant [fol. 146] Elmer Hartzell guilty as charged in each count of the indictment, or all the counts of the indictment, the form of your verdict will be:

"We, the jury, find the defendant Elmer Hartzell guilty as charged in the indictment."

That will be signed first by the foreman or the forewoman; you will elect a foreman or forewoman when you retire to your jury room.

If you find that he is not guilty as to any of the counts in the indictment, the form of your verdict will be:

"We, the jury, find the defendant Elmer Hartzell not guilty as charged in the indictment."

If your verdict should be that he is guilty as to some counts and not guilty as to others, then your form of verdict will be:

"We, the jury, find the defendant Elmer Hartzell guilty as charged in counts," numbering specifically the counts of the indictment, "and not guilty as charged in counts numbered," numbering specifically the number of the counts of the indictment.

Whatever form of verdict you return will be signed in the same manner as indicated.

Then as to the defendant Newell Mecartney, there will be three forms of verdict of the same character that I have read to you, and you will take them with you.

As to the defendant Elmer William Soller, there will be three forms of verdict and you will fill out the forms in accordance with your findings in each case.

The two alternate jurors will now be discharged, you will not be required to serve further on this case and you will separate from the other jurors.

The jury may retire to the jury room. The exhibits will be taken into your room.

(Exhibits taken to jury room and considered by the jurors.)

And thereupon the jury returned their verdict in and by which they found the defendant, Elmer Hartzel, guilty on all counts of the indictment and found the defendant, Elmer William Soller, guilty as to Counts 5, 6 and 7, of the indictment, and not guilty as to Counts 1, 2, 3 and 4.

Thereupon the said defendants, Elmer Hartzel and Elmer William Soller, moved the Court to grant the said defendants a new trial of the cause.

And thereupon the said motions for a new trial came on [fol. 147] for hearing and were argued by the respective counsel for said defendants and for the Government.

Thereupon the Court having considered the arguments of counsel delivered the following opinion:

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—33721) * *

MEMORANDUM OPINION OF JUDGE HOLLY

The defendants are indicted in this case charged with unlawfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and wilfully obstructing the recruiting and enlistment to service of the United States. The indictment consists of five counts. The first count charges the defendants with wilfully publishing and distributing and causing the publication and distribution of a certain document entitled "The British: An Inferior Breed" which was calculated and intended by the defendants to induce persons eligible and available for recruiting and enlistment in the military and naval service of the United States to fail and refuse to enlist for such service and to refuse to submit to registration and selection for said service.

The second count was based upon the same document and charged the defendants with publishing and circulating the same document knowing that said document was calculated and intended by defendants to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces to the injury of the service of the United States.

The third count charges the publication and distribution by defendants of a certain other document entitled "The Jew Makes a Sacrifice" well knowing that said document was calculated and intended by defendants to induce persons available and eligible for recruiting and enlistment to fail and refuse to enlist for service in the military and naval service in the United States and to induce said persons to refuse to submit to registration and selection for such service.

The fourth count charges the preparation and circulation of the same document well knowing that it was cal- [fol. 148] culated and intended by defendants to cause insubordination, disloyalty and mutiny and refusal of duty

in the military and naval forces of the United States to the injury of the service of the United States.

The fifth count is of the same character as the first and third and is based upon a certain other document which was described in the evidence as being entitled "The Diseased Spinal Cord."

Count Six is based upon the same document and makes the same charges as the second and fourth counts.

Count Seven is a conspiracy count based upon the publication, circulation and distribution of the aforesaid documents for the purposes set forth in the preceding counts.

The jury returned a verdict finding the defendant Hartzell guilty on all counts of the indictment and the defendants Soller and Mecartney guilty as to the 5th, 6th and 7th counts only.

Defendants have moved for a new trial asserting that the evidence does not support the verdict and raising certain questions as to the admission of evidence and the instructions.

First as to the defendant Hartzell. I am convinced that the jury was justified in returning a verdict finding this defendant guilty on all counts. The documents in question were written and distributed after this nation was at war with Germany and Japan. The circular entitled "The British: An Inferior Breed" charged, among other things, that "The Germans keep 'em flying," meaning the British, "wherever they find them. They run at the mouth as well as the bowels"; and "They are now fighting for Christ with Bloody Joe." The question is asked "Who betrayed America to the empire of the British-Jewish yellow-race? Rosenfeld. We are the victims of his Infantilism; he cannot stand alone." Again "Are Americans United: Yes. Externally with the corpus of a degenerate empire; internally with the sick body of 'our leader.'"

Other portions of the pamphlet are as follows: "What is behind the doctrine of 'no appeasement'? * * * The effort of the Jew-vicious persecutor of peoples—to save himself. * * * The beginning of insanity as the masses of the so-called 'democracies' are led toward the destruction of Europe, homeland of the West."

"Why was Pearl Harbor evidence of Justice? While trying to save a yellow race in the Atlantic we were hit a [fol. 149] deadly blow by a yellow race in the Pacific. Like

a cow hit on the head by a hammer when led to slaughter, we now follow 'our leader' as he moves forward on a sick spine to war."

In the circular "The Jew Makes a Sacrifice: The forthcoming Collapse of America" it was said, among other things, "Indeed like a snake forced from its nest, the slimy blood lust of the 'holy people' now stands revealed—for is it not evidence that the Jew Hates bloodshed only when his own skin is in danger?" * * * "Today, in fact, almost any crime may be committed in his name in connection with fine words such as 'freedom'. How else justify blood soaked booms; attempts to starve Europe by blockade; an alliance with bloody Joe; and the massing of enormous quantities of men and materials with which to 'crush' the Germans—except by offsetting the degeneracy of such acts by declaring them to be dictated by the 'spirit'."

"The oriental Japanese struck at Port Arthur in 1904, and at Pearl Harbor while negotiating. The Jew does not have their manfulness for open warfare, but he will—while conserving his own blood—eventually strike those with whom he lives in the back. He is now infiltrating into the Government jobs under cover of 'no race prejudice'. He is, in fact, 'dying' for the coming of bolshevism by making ready for your collapse. After many of the young men of America are killed—when the sick, exhausted, the cunning remain—then he will, as in Russia, crawl from his nest."

In the circular a portion of which is set out in Count 5 of the indictment entitled "The Diseased Spinal Cord" there appears the following:

"Wilson died an invalid; Roosevelt became president as one. What is the *social* significance of his condition?

"*United with a paralytic.*

"With the cunning and sweetness of a cripple he kept us out of war. His duplicity is in part a result of a lack of coordination between brain and injured nervous system. Connected with the accompanying inferiority is a fear of isolation—a craving to be united. He would as a consequence extend his sickness all over the world. Almost everyone then would be equal, united, with no one able to stand alone.

"Not long ago we 'saved ourselves' by a program of relief, from the enervating effects of which we were unable to rise by manful effort. From the accompanying decay

[fol. 150] an external enemy was needed upon which to fasten the blame. Uniting with the decaying carcass of the British empire and war against the Germans were taken as solutions to the problem: they serve as counterpoises to our internal breakdown. For the condition of which his illness is a symptom requires continually widening spheres of action to prevent breakdowns from its ravages.

"*The enemy within.*

"Hidden with the present program to save humanity are germs of infantilism, paralysis and death. For we now follow, not a little child, but a man with a child's disease.

"I dare you to hit me said our leader to the 'bad' dictators. He now twists on his weak spine as we move irresistibly toward the feared spectre—isolation. For as the people of Europe slowly unite to repel invaders who mouth over phrases about peace, God and civilization, many are beginning to recoil with horror from a proposed invasion of Americans who, as before, would only accentuate world revolution.

"Crush my enemies screams Jewry; be bold; take the offensive; we'll back you up. We're fighting for freedom says our leader, with his sick body coiled around the brain as with a snake prepared to strike. We're fighting to save Poland say the British hysterically; we hat- other peoples aggression.

"America was betrayed. The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by:

"A stench from rotting carcasses of those who would again invade Europe;

"Starvation for millions of British who thought they could starve others;

"Dissolution from an internal war of race against race;

"Occupation by foreign troops until we are able to stand alone; and at last

"The appointment of a bedside cabinet to investigate the condition of (Rosenfeld) our leader."

Six hundred copies of each of these pamphlets were sent out by Hartzell. They were sent to various people and organizations, among others, labor unions, America First Committees, District and State Commanders of the American Legion, We, the Mothers Mobilize and Kiwanis Clubs and other like organizations.

Whether the distribution of these pamphlets would have a tendency to cause insubordination, disloyalty and refusal [fol. 151] of duty in the military and naval forces of the United States and obstruct recruiting and enlistment was a question for the jury to determine. The meaning *of* the words convey is that we are engaged in an unholy and unrighteous war; that America has been betrayed by "Rosenfeld" to the "British-Jewish yellow race"; that behind the determination of the nation to carry on the war is the "disease of a paralytic who wants to be a hero as compensation for his ailments" and that Pearl Harbor was evidence of justice. All through the pamphlet runs the charge that this is not a war brought upon us by the attack of our enemies, but that the Jews for their own selfish purposes have brought us needlessly into the conflict, that America was betrayed by the President and the Jews, and that the "butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by * * * occupation by foreign troops until we are able to stand alone."

These pamphlets are unlike some of those sent out during the war upon which we entered in 1917 which some members of the Supreme Court found not to be intended to interfere with recruiting or to cause insubordination or disloyalty. Those were issued to promote the cause of a political party or propagate the economic or political theories of those who composed and published them. The pamphlets put out appear on their face to have but one purpose, to interfere with the prosecution of the war. For the first time in our history our freedom as a people and our existence as a nation are threatened. We were directly attacked and war was declared upon us by powerful enemies. It is because of this that our young men are called upon to enlist in our armies. This defendant circulated literatare telling them we were led into the war by a paralytic seeking glory, solely for the benefit of the Jews.

The obvious effect of the distribution of these pamphlets it seems to me, would be to discourage and hamper enlistments and recruiting and to cause insubordination and disloyalty by those members of our military and naval service into whose hands they might fall. And it must be remembered that not only those who have been inducted but also all those who under the law are subject to the draft.

It is urged, however, that to constitute the crime charged in the indictment it must appear not only that the litera- [fol. 152] ture was calculated to have the effect charged in the indictment but that it was intended it should have that effect. Counsel say the evidence does not show that intent. I cannot agree. All of the circumstances of the case, it seems to me, the very language of the pamphlets composed and distributed by Hartzell show such intent. For what purpose other than hindering the carrying on of the war in any way did he have or could he have had in mind? He appeared on the stand to be an unusually shrewd person. The story he tells of his education and his activities indicate that whatever he does is deliberate and with a definite purpose. He is not a fanatic attached to a cause, having political and economic theories for the liberation of oppressed peoples as were the defendants in *Pierce* v. *United States*, 252 U. S. 239, and *Abrams* v. *United States*, 250 U. S. 616, where Justices Holmes and Brandeis in dissenting opinions found that the literature distributed by the defendants had as its purpose propagating certain economic ideas rather than interfering with enlistment or recruiting or insubordination or disloyalty to the army. In this case the jury were warranted in presuming from the preparation and circulation of the literature that Hartzell intended to obstruct enlistment and recruiting and to cause insubordination and disloyalty in the military service of the United States. Every sane man is presumed to intend the natural and probable results of his deliberate acts. *House* v. *United States*, 78 F. (2d) 301, *Bentall* v. *United States*, 262 Fed. 744, *People* v. *Wilson*, 342 Ill. 358, 365. Counsel urge that this rule applies only in negligence not in criminal cases, but the contrary is the law.

Counsel, contending that defendants were within their constitutional rights in criticising the war, call my attention to some of the things said in the dissenting opinion in *Abrams* v. *United States*, 250 U. S., and *Pierce* v. *United States*, 252 U. S. 239, and to the opinion of Mr. Justice Thompson speaking for the court in *City of Chicago* v. *Tribune Co.*, 307 Ill. 595. But as Mr. Justice Holmes said in *Schenck* v. *United States*, 249 U. S. 47:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring

about the substantive evils that Congress has a right to prevent."

In that case and in *Debs* v. *United States*, 249 U. S. 211, [fol. 153] the court held that the words were such and were used in such circumstances as to create a clear and present danger that would bring about the substantive evil that Congress had a right to prevent i.e., interference and obstruction of enlistment and recruiting and insubordination and disloyalty in the military forces of the United States. It is true that Hartzell would not likely reach as many people with his pamphlets as Debs and Schenck did, but that presents only a question of degree. To obstruct the enlistment of a simple person or to cause or attempt to cause the insubordination of a single member of the military forces of the United States is sufficient to constitute the crime.

Neither is it necessary that it be shown that any person was caused to refuse to enlist. As Justice Holmes said in this same case, "It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced * * * If the act, (speaking or circulating a paper) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."

Further in the opinion in the Schenck case Justice Holmes said:

"When a nation is at war words that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court would regard them as protected by any constitutional right."

And in *City of Chicago* v. *Tribune Co.*, *Supra*, Mr. Justice Thompson said (p. 603) speaking of the Sedition Law of 1798:

"In so far as this law punished defamation of the President or any other person and in so far as it punished those who advocated resistance to law or rendered aid to a foreign foe, it was, of course, constitutional."

In my opinion the jury were justified in finding that the pamphlets would have the effect and were prepared and circulated by Hartzell with the intent charged in the indictment. The motion for a new trial will be overruled as

to him and it is the sentence of the court that he be imprisoned for a term of five years.

As to the defendant Sollers I am of the opinion that the verdict is justified by the evidence. He realized the character of the matter he was producing. By his own testi- [fol. 154] mony he had inquired of Newell Mecartney whether it was proper to be put out. Mecartney refused to advise him. That should have been sufficient warning. His only excuse for assisting Hartzell was the money he was receiving. He was, however, a mere dupe. I am not inclined to inflict severe punishment. His sentence will be imprisonment for a period of one year and one day.

Since the verdict was returned in this case I have caused an abstract of the evidence concerning Newell Mecartney to be made. There appears to be no evidence at all in the record that he had any active part in the distribution of the pamphlets produced by Hartzell. The most that the evidence shows is that he did nothing to prevent it. But that does not make him a participant in the crime. He may be anti-Semitic and hate the administration in Washington. He may have sympathized with Hartzell, as contended by the Government, and have been perfectly willing that Hartzell should obstruct enlistment and recruiting but he cannot be convicted for merely standing by and permitting Hartzell to engage in the criminal activities charged.

I am not overlooking the speech he made in which he spoke of Pearl Harbor being a well deserved punishment, etc. But the context shows that he was not expressing sympathy with Japan nor opposition to our war effort at that time. I am of the opinion that on the evidence in this record I should have directed a verdict of not guilty as to him. His motion for a new trial must be granted.

And Thereupon the Court having considered said motions overruled and denied the same, to which ruling of the Court said defendants excepted.

Thereupon the said defendants moved the Court in arrest of judgment, which motion the Court overruled and denied, to which ruling of the Court the defendants excepted.

Thereupon the Court gave judgment upon the said verdicts and sentenced the defendant, Elmer Hartzel, to imprisonment for a term of five years, and sentenced the defendant, Elmer William Soller, to serve a term of one year.

Which Was All the Evidence Heard, considered material

to said cause, and all the proceedings had upon the trial thereof, necessary or material to be shown in this Bill of Exceptions. That the Exhibits not shown herein in exact copy are sufficiently described in the testimony of witnesses testifying thereto.

[fol. 155]. CERTIFICATE TO BILL OF EXCEPTION

Forasmuch Therefore as the matters and things herein above set forth do not otherwise appear of record, the defendants, Elmer Hartzel and Elmer William Soller, tender this their joint and several Bill of Exceptions containing the evidence introduced at the trial of said cause pertaining to the charges against them contained in said indictment, together with the rulings of the Court and the exceptions allowed, and the exhibits necessary to the understanding of the case; and upon stipulation of the parties and it appearing that the trial judge William H. Holly is ill and unable to attend and be present in court within the time fixed by the Circuit Court of Appeals being May 27, 1943 to settle the Bill of Exceptions herein and perfect the appeal in said court, and I, the undersigned, Judge of the United States District Court, do find that each and every matter therein contained is true and correct and the same is hereby signed, sealed, settled and allowed as a full, true, and correct Bill of Exceptions of the said defendants in this cause.

Dated this 27th day of May, A. D. 1943.

Philip L. Sullivan, Judge of the United States District Court, Northern District of Illinois, Eastern Division at Chicago. (Seal.)

OK Ode L. Rankin, Atty for Hartzel.

OK Wm. J. Powers, Attorney for Elmer Soller.

OK John J. Kelly, Jr., Ass't United States Atty.

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—33721)

ORDER OVERRULING MOTIONS FOR DIRECTED VERDICT, ETC.—
Entered January 13, 1943

This being the day and hour to which the further trial of this cause was on yesterday continued comes the United

[fol. 156] States by the United States Attorney come also the defendants Elmer Hartzel, Elmer William Soller and Newell Mecartney in their own proper persons and by their counsel comes also the Jury and alternate Jurors duly elected empaneled and sworn herein for the trial of this cause and thereupon this cause coming on to be heard upon the defendants motions for a directed verdict after arguments of counsel and due deliberation by the Court said motions are overruled to which ruling of the Court each defendant by his attorney duly excepts and the Jury having heard the arguments of counsel and charge of the Court retire with sworn marshal to consider of their verdict and it is

Ordered that the alternate Jurors Thos. F. Kerr and Arthur E. Gabee be and they are hereby discharged from rendering a verdict herein and it is

Further Ordered that this cause be and the same is hereby continued to January 14, A. D. 1943 at 10:15 o'clock A. M.

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—33721)

VERDICT—January 14, 1943

This day comes the United States by the United States Attorney come also the defendants Elmer Hartzel, Elmer William Zoller and Newell Mecartney in their own proper persons and the Jury heretofore empaneled and sworn herein for the trial of said cause also come and say "We the Jury find the defendant Elmer Hartzel guilty as charged in the indictment." "We the Jury find the defendant Newell Mecartney guilty on counts five, six and seven and not guilty on counts one, two, three and four." "We the Jury find the defendant Elmer William Soller guilty on counts five, six and seven and not guilty on counts one, two, three and four," whereupon all defendants by their attorney enter herein their motion for a new trial in said cause which motion is entered and set for hearing on January 23, A. D. 1943, and it is

[fols. 157-162] Ordered that the bonds of the defendants Newell Mecartney and Elmer William Soller are to remain in full force and effect.

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—33721)

JUDGMENT—Entered February 8, 1943

This day comes the United States by the United States Attorney comes also the defendant Elmer Hartzel in his own proper person and thereupon this cause coming on to be heard on the defendant's motion heretofore entered herein for a new trial in said cause after arguments of counsel and due deliberation by the Court said motion is overruled and a new trial denied to which ruling of the Court the defendant duly excepts whereupon the defendant enters herein his motion in arrest of judgment which motion is also overruled to which ruling of the Court the defendant duly excepts and the defendant being asked by the Court if he has anything to say why the sentence and judgemnt of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced it is therefore considered and

Ordered by the Court and is the sentence and judgment of the Court upon the Verdict of guilty so rendered by the Jury aforesaid that the defendant Elmer Hartzel be committed in the Custody of the Attorney General for a period of Five (5) Years.

It Is Further Ordered that the execution of the mittimus be stayed for a period of 30 days.

William H. Holly, United States District Judge.

February 8, 1943.

* * * * * * *

[fol. 163] IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—33721) * *

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH DISTRICT—Filed February 13, 1943

Name and address of appellant: Elmer Hartzel, 5610 Dorchester Ave., Chicago, Illinois.

Name and address of appellant's attorneys: Benedict J. Short, 10 South LaSalle Street, Chicago, Illinois. Ode L. Rankin, 134 North LaSalle Street, Chicago, Illinois.

Offense: Violation of Sections 33 and 34, Title 50, United States Code Annotated, by certain alleged seditious acts and conspiring to do certain alleged seditious acts.

Date of Judgment: February 8, 1943.

Brief description of Judgment or Sentence: Imprisonment in a penitentiary for a term of five years.

Name of prison where now confined if not on bail: County Jail, Cook County, Ill.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the judgment above mentioned on the grounds set forth below.

Elmer Hartzel, Appellant.

Dated: February 12th, 1943.

[fol. 164] Grounds of Appeal:

1. The indictment in said cause is insufficient to sustain a conviction.

2. No one count in said indictment is sufficient to sustain a conviction.

3. The evidence does not prove beyond reasonable doubt that this defendant was guilty as charged.

4. The Court erred in admitting improper evidence on behalf of the Government.

5. The Court erred in refusing to admit proper evidence on behalf of this defendant.

6. The verdict of the jury is against the law and the evidence.

7. The Court erred in instructing the jury.

8. The Court gave to the jury improper instructions with reference to the intent necessary to constitute the crimes charged.

9. The verdict of the jury is the result of passion, prejudice and war hysteria.

10. The Court erred in overruling the motion of this defendant at the close of the Government's case to instruct the jury to find this defendant not guilty as charged.

11. The Court erred in overruling the motion of this defendant at the close of all the evidence in the case to find this defendant not guilty of the charges in the indictment.

12. The Court erred in admitting in evidence improper, impertinent, irrelevant, and immaterial testimony and documentary evidence and exhibits.

13. The evidence does not show beyond a reasonable doubt that this defendant was guilty of a specific intent to commit the crimes charged in the indictment.

Wherefore this defendant says that he did not receive a fair and impartial trial in this cause according to the laws of the United States, the Constitution thereof, and the law of the land.

Elmer Hartzel, Appellant.

Benedict J. Short, Ode L. Rankin, Attorneys for Appellant.

[fol. 165] PROOF OF SERVICE

I hereby acknowledge receipt of a copy of the foregoing Notice of Appeal and Grounds for Appeal, this 13th day of February, A. D. 1943.

Wm. J. Connor, Asst. U. S. Atty., United States District Attorney.

* * * * * * *

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—33721) * *

ASSIGNMENT OF ERRORS—Filed May 24, 1943

Now comes Elmer Hartzell, defendant, and assigns errors upon the record of said cause and says that the following errors intervened in said cause:

1. The Court erred in denying defendant's motion to find him not guilty as to each count of the indictment.

2. The Court erred in denying defendant's motion for a new trial.

3. The Court erred in denying defendant's motion in arrest of judgment.

4. The Court erred in sentencing the defendant upon the record made.

5. The Government did not prove the defendant guilty beyond reasonable doubt and the Court erred in submitting the cause to the jury and in rendering judgment upon the verdict of the jury.

6. The indictment does not charge a crime under the Act of Congress in question and the Court erred in submitting the cause to the jury and in rendering judgment upon the verdict of the jury.

7. The evidence produced by the Government did not prove a violation of the Act of Congress in question and the Court erred in submitting the cause to the jury and in rendering judgment upon the verdict of the jury.

8. The Court erred in admitting improper evidence on behalf of the Government and in refusing to admit proper evidence on behalf of the defendant.

[fol. 166] 9. The verdict of the jury is against the manifest weight of the evidence and the Court erred in rendering judgment upon the verdict.

10. The defendant's consfitutional rights were violated and invaded by the said judgment of conviction.

11. The Court erred in instructing the jury.

12. The Court gave to the jury improper instructions with reference to the intent necessary to constitute the crimes charged.

13. The verdict of the jury is the result of passion, prejudice and war hysteria.

14. The Government did not show beyond a reasonable doubt that this defendant was guilty of a specific intent to commit the crimes charged in the indictment and the Court erred in rendering judgment upon said verdict.

15. That the statute and laws under which the defendant was convicted and sentenced is void for ambiguity and uncertainty.

Elmer Hartzell, by B. J. Short, Ode L. Rankin, His Attorneys.

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—33721) • •

ORDER—Entered February 24, 1943

It Is Ordered by the Court that the bond of the defendant Elmer Hartzel on appeal be and the same is hereby fixed at the sum of Five Thousand Dollars ($5000) and the bond for the defendant Elmer William Soller be and the same is hereby fixed at the sum of Two Thousand Five Hundred ($2,500) Dollars and bill of exceptions as to each defendant to be filed by April 8, A. D. 1943.

[fol. 167] IN THE DISTRICT COURT OF THE UNITED STATES

• • • (Caption—33721) • • •

ORDER—Entered April 8, 1943

On motion of counsel for the defendants it is

Ordered that the time to docket the record on appeal to the Circuit Court of Appeals and to approve the bill of exceptions be and the same is hereby extended to fifteen (15) days from this date.

IN THE DISTRICT COURT OF THE UNITED STATES

• • • (Caption—33721) • • •

ORDER—Entered April 15, 1943

On motion of counsel for the defendant Elmer William Soller it is

Ordered that the Clerk of this Court be and he is hereby ordered to certify to the Circuit Court of Appeals the following exhibits of record: Numbers 60, 45, 46, 37, 36, 42, 30A, 43 and 31.

IN THE DISTRICT COURT OF THE UNITED STATES

• • • (Caption—33721) • • •

ORDER APPROVING BILL OF EXCEPTIONS—Entered May 27, 1943

This day come the defendants by their attorneys and present herein their Bill of Exceptions which Bill of Ex-

[fol. 168] ceptions is approved and signed by the Court and ordered by the Court to be filed by the Clerk of this Court.

IN THE DISTRICT COURT OF THE UNITED STATES

* * * (Caption—33721) * * *

PRAECIPE FOR RECORD—Filed April 21, 1943

To the Clerk:

The Clerk will please prepare a transcript of the record for use on appeal to the United States Circuit Court of Appeals for the Seventh District and include therein the following documents and orders:

1. Indictment.
2. Plea of each of the said defendants.
3. Appearance of B. J. Short for defendant Hartzell.
4. Motion of defendant Hartzell for directed verdict at the close of the Government's case.
5. Motions for directed verdict at the close of all the evidence.
6. Verdict as to each of the said defendants.
7. Judgment order on February 8, 1943 as to each of the said defendants.
8. Notice of Appeal for defendant Soller.
9. Notice of Appeal for defendant Hartzell.
10. Order of February 24, 1943 as to bond and Bill of Exceptions.
11. Order of March 9, 1943 approving appeal bond of defendant Soller. (Clerk's notation: no order.)
12. Order of April 8, 1943 extending time to docket record on appeal and to approve Bill of Exceptions.

[fols. 169-172] 13. Order of April 15, 1943, directing the Clerk to certify certain exhibits.

14. Bill of Exceptions.
15. Praecipe for Record.
16. Any additional Praecipe for Record.
17. Order approving Bill of Exceptions to be entered.

18. Any other orders subsequently entered or documents filed affecting the appeal.

William J. Powers, Attorney for defendant, Elmer William Soller. B. J. Short, Ode L. Rankin, Attorneys for defendant, Elmer Hartzell.

[Clerks' Certificates to foregoing transcript omitted in printing.]

* * * * * * *

[fol. 173] [Caption omitted.]

[fol. 174] In United States Circuit Court of Appeals, Seventh Circuit

8253

The United States of America, Plaintiff-Appellee,

vs.

Elmer Hartzel, Defendant-Appellant

8264

The United States of America, Plaintiff-Appellee,

vs.

Elmer William Soller, Defendant-Appellant

Order Taking Cause under Advisement—September 28, 1943

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division

Now this day come the parties by their counsel, and these causes come on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Wm. J. Powers, counsel for appellant Elmer William Soller, Mr. Ode L. Rankin, Counsel for appellant Elmer Hartzel, and by Mr. William J. Connor counsel for appellee, and the Court takes these matters under advisement.

[fol. 175] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM AND SESSION, 1943

No. 8253

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ELMER HARTZEL, Defendant-Appellant

No. 8264

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ELMER WILLIAM SOLLER, Defendant-Appellant

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division

Before SPARKS, MAJOR and KERNER, *Circuit Judges*.

OPINION—Filed October 14, 1943

MAJOR, *Circuit Judge*. Appellants Hartzel and Soller, together with one Mecartney, were tried by a jury and found guilty of violating Secs. 3 and 4 of the Espionage Act (Secs. 33, 34, Title 50, U. S. C. A.). The indictment contained seven counts, the first six of which charged the substantive offense of sedition, while count 7 charged a conspiracy to commit such substantive offense. A motion for new trial was allowed as to Mecartney and the cause dismissed as to him. Judgment was rendered against Hartzel and Soller, who have perfected separate appeals. They may both be appropriately disposed of in one opinion.

The substantive counts are predicated upon three pamphlets, entitled "The British: An Inferior Breed"; "The [fol. 176] Jew Makes A Sacrifice: Forthcoming Collapse of America"; and "The Diseased Spinal Cord." In all of such counts, it is charged that the defendants prepared, published and distributed such pamphlets throughout the United States, while the United States was at war. Counts 1, 3 and 5 alleged that by such action the defendants wilfully and knowingly obstructed the recruiting and enlistment service of the United States, and counts 2, 4 and 6 that the

defendants wilfully and knowingly did cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and that the defendants well knew that said pamphlets would produce the result complained of.

It perhaps would serve no good purpose to set forth all these pamphlets in their entirety, and certainly it would unduly lengthen this opinion. The one entitled "The British: An Inferior Breed" is in question and answer form, as follows:

"*Are they degenerate?*

"Plainly. Never again shall they be permitted to try to bring the slinking death of starvation to Europe, squealing hysterically as they do so about 'freedom'.

"*What is the present position of our 'protectors'*, proclaimed saviors of Poland?

"Now on the lease-lend dole, they are a kept woman.

"*Are they a cultured people?*

"Standing as an outpost to the continent of Europe, they are a parasite on its art, science and civilization.

"*In what way are they kept flying?*

"The Germans keep 'em flying wherever they find them. They run at the mouth as well as the bowels.

"*Will the British Isles be policed?*

"It will be unnecessary. When the people upon whom they are fastened withdraw their support, they will collapse.

"*What is the new blasphemy?*

"Making Christianity a slimy thing for those who crawl and creep by an island breed which—possessed of an empire obtained by aggression—points the finger of guilt at others. They are now fighting for Christ with bloody Joe.

"*Who betrayed America* to the empire of the British-Jewish yellow race?

[fol. 177] "Rosenfeldt. We are victims of his Infantilism; he cannot stand alone.

"*Are Jews rushing forward to war* after urging you to crush 'em?

"No. But when America is exhausted they, as in Russia, will slither forth to sink their fangs into its body.

"*Are Americans united?*

"Yes. Externally with the corpus of a degenerate empire: internally with the sick body of 'our leader.'

"*What is behind the doctrine of 'no appeasement'?*

"The fear of aggression on the bloated domains of an empire which cannot stand alone;

"The inhuman cruelty of America's first blood soaked boom;

"The rumble of world revolution—a repercussion of its indecencies;

"The effort of the Jew—vicious persecutor of peoples—to save himself;

"The disease of a Paralytic who wants to be a hero as compensation for its ailment;

"The beginning of insanity as the masses of the so-called 'democracies' are led toward the destruction of Europe, homeland of the West.

"*Why was Pearl Harbor evidence of justice?*

"While trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific. Like a cow hit on the head by a hammer when led to slaughter, we now follow 'our leader' as he moves forward on a sick spine to war."

The pamphlet entitled "The Jew Makes A Sacrifice: The Forthcoming Collapse of America" is in part as follows:

"Our blood soaked boom of the first World War was followed by a speculative orgy, then collapse. A similar maladjustment now seeks an outlet in another blood soaked boom which will end as before. In all of this the Jew—oriental hyphenated American, propagandist for bloody Joe and the British (Jewish) empire—has been an eager participant. Indeed, like a snake forced from its nest, the slimy blood lust of the 'holy people' now stands revealed—for is it not evident that the Jew hates bloodshed only when his own skin is in danger?

* * * Today, in fact, almost any crime may be com- [fol. 178] mitted in his name in connection with fine words such as 'freedom'. How else justify blood soaked booms; attempts to starve Europe by blockade; an alliance with bloody Joe; and the massing of enormous quantities of men and materials with which to 'crush' the Germans—except by offsetting the degeneracy of such acts by declaring them to be dictated by the 'spirit'.

"The oriental Japanese struck at Port Arthur, in 1904, and at Pearl Harbor while negotiating. The Jew does not have their manfulness for open warfare, but he will—while conserving his own blood—eventually strike those with whom he lives in the back. He is now infiltrating into Government jobs under cover of 'no race prejudice'. He [illegible], in fact, 'dying' for the coming of bolshevism by making ready for your collapse. After many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest. * * *"

The pamphlet entitled "The Diseased Spinal Cord" is in part as follows:

"Wilson died an invalid; Roosevelt became president one. What is the social significance of his condition?

"A clue is given in the statement that syphilis is 'the result of an illness of moral, social and racial instincts' of which prostitution is an integral part. Similarly the breakdown of Wilson after the 'peace' was probably connected with reactions from the emotional debauchery of preceding years. It is, therefore, suggested that the epidemic of paralysis in New York State at a later time had a source in the weakening of nervous systems, brought about by the emotional self-masturbation of stories of the 'bad' Germans.

"Our leader—safe in Washington—escaped the actual horrors of war, but he could not escape the virus of a child's disease. As with syphilis his paralysis is indicative of severe maladjustments within the nation. He reproduces within his body our internal breakdown; he is in fact a degenerate who now seeks ways of having us cure him of his ailment. * * *

"Hidden within the present program to save humanity are germs of infantilism, paralysis and death. For we now follow, not a little child, but a man with a child's disease. * * *

[fol. 179] "Crush my enemies screams Jewry; be bold; take the offensive; we'll back you up. We're fighting for freedom says our leader, with his sick body coiled around the brain as with a snake prepared to strike. We're fighting to save Poland say the British hysterically; we hate other peoples aggression.

"America was betrayed. The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by:

"A stench from rotting carcasses of those who would again invade Europe;

"Starvation for millions of British who thought they could starve others;

"Dissolution from an internal war of race against race;

"Occupation by foreign troops until we are able to stand alone; and at last

"The appointment of a bedside cabinet to investigate the condition of (Rosenfeld) our leader."

That defendant Hartzel was the author of these pamphlets, and sent several hundred of them through the United States mail, is not disputed. There were also introduced as bearing upon the question of intent and purpose numerous other articles and pamphlets of the same general tenor, prepared and circulated by him prior to the entry of the United States into the present war.

Both Hartzel and Soller urgently insist that the proof failed to present a jury question and that the court erred in its refusal to direct a verdict in their favor. In deciding this question, we need not consider the proof as it pertains to each count of the indictment for the reason that the judgment could have been imposed upon any of the substantive counts. If the proof is sufficient to sustain any count, an affirmance is required. *Abrams* v. *United States*, 250 U. S. 616, 619. It follows, therefore, that we need not discuss defendants' argument that the proof fails to show a successful accomplishment of the alleged objectives. Counts 2, 4 and 6 charge the defendants with an "attempt to cause, insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States." Whatever room there may be for difference of opinion as to whether an accomplished result must be proved when alleged, there seems little, if any, merit in the [fol. 180] contention that such proof is required to sustain an attempt to cause such result.

It is argued that the publications in controversy were permissible as free speech, guaranteed by the Constitution. Certainly free speech is not an empty privilege, even during a time of war, but on the other hand, the right is not

without limitation. As was said by the court in *Schenck* v. *United States*, 249 U. S. 47, 52: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Location of the boundary line between that which is privileged and that which is restrained is ofttimes difficult to determine. Generally, it must be found from the character of the utterance, in connection with the time, place and manner of its making. As was said in the *Schenck* case, *supra*, page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

A charge of attempt to accomplish that which Congress has proscribed must depend upon intent or motive, and ordinarily presents a jury question. As was said by the court in *Pierce* v. *United States*, 252 U. S. 239, 249:

> "If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have a tendency to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States."

And again, the court on the following page stated:

> "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide."

It is true, as pointed out by the defendants, that in the [fol. 181] Pierce case, as well as in some of the other cases in which the Supreme Court has announced a similar rule, the alleged seditious pamphlets or speeches contain some

direct reference or appeal to those eligible for or actually engaged in the military service. No doubt in such instances the intent or motive is more readily apparent. We are of the view, however, that the test enunciated by the Supreme Court as to what constitutes a seditious utterance is not to be limited merely to those cases where a direct appeal is made. If the condemned utterance is reasonably calculated to produce the proscribed result, the purpose and motive is within the province of a jury.

Defendant Hartzel stated his motive thus:

> "Finally, the prime motive which impelled me in writing and distributing the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races."

It is inconceivable that his defamatory statements concerning the President, the British or the Jews, could have created any sentiment against war or have been any aid in uniting the white against the yellow races. It is equally inconceivable that the attacks were made with any such motive. It is likewise inconceivable that any purpose was sought to be achieved consistent with the welfare of the country. On the other hand, it is entirely reasonable to believe that the purpose was to interfere with the successful prosecution of the war. It must be assumed, we think, that Hartzel expected those who read his pamphlets to accept their contents as the truth; otherwise, there could have been no purpose in their circulation. Certainly it cannot be reasonably insisted that the defamatory and vicious attack made upon the President of the United States, the Commander-in-Chief of the armed forces of the nation, if believed as the defendant Hartzel expected, would not seriously affect, if not destroy, the morale of the nation, both the civilian and the military. With the morale thus destroyed, insubordination, disloyalty and mutiny would be the inevitable result. Publications concerning the British and the Jews, if believed, would no doubt produce a similar result.

[fol. 182] It may be, we hope it is a fact, that there are few if any persons in this country so naive as to place any credence in the articles complained of, and it may be that

no great harm resulted from their publication. Assuming such to be the case, Hartzel is not relieved of attempting to do that which Congress has proscribed.

Even though an intent is the gist of the offense, it is not necessary that such intent be shown by direct proof. It is to be gathered from the defendants' acts, together with the surrounding facts and circumstances. We see no reason why the intent in a case of the instant character may not be found in the same manner as in any other case where it is an essential element. If a person deliberately shoots at another without reason or excuse, he would be guilty of an assault with intent to kill. We suppose that if he deliberately fired a gun into an assembly of people, all of whom were strangers, he likewise would be guilty of an assault with intent to kill any person who might be injured. It is a familiar rule of law, and we think applicable in the instant case, that a person who acts in reckless disregard of the rights of others is liable for the consequences of such acts. Under such circumstances, he is presumed to intend that which is calculated to result from his act. "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." *Abrams* v. *United States, supra*, page 621. We are of the view that a jury question was presented as to Hartzel, especially under counts 2, 4 and 6.

As to the defendant Soller, a different situation is presented. If the judgment against him is affirmed, it must be solely upon the ground that he mimeographed the alleged seditious pamphlets. The proof discloses that Soller first met Hartzel in March or April of 1941, when the latter came to his office and made inquiry as to the price of mimeographing, in which business Soller was engaged. On three occasions, Soller mimeographed pamphlets from manuscripts furnished by Hartzel. He charged and was paid his usual compensation for such work. There is no proof that Soller at any time prior to doing the work was advised or had knowledge of the use to which the pamphlets were to be put by Hartzel. True, after the third and last lot of pamphlets had been delivered to Hartzel, Soller became suspicious and upon inquiry learned from Hartzel that the pamphlets were being sent through the mail. Soller as a [fol. 183] witness even denies that he had knowledge of the contents of the pamphlets, except as to certain words which attracted his attention as they were being mimeographed.

Incredible as this may sound on its face, a reading of his testimony furnishes support to the plausibility of such statement. At any rate, there is no proof as to his knowledge. A few minor circumstances relied upon by the government are without significance.

We are of the view and so hold that the proof was not sufficient to present a jury question as to Soller and that he was entitled to a directed verdict. What we have said applies to the conspiracy as well as the substantive counts. The proof fails to show an agreement between these two defendants or that they were acting in concert or in a conspiracy, as charged.

Complaint is also made of the court's charge as it pertains to the matter of intent. What we have said on that subject largely disposes of the criticism and we shall not discuss it further.

The proof being sufficient to present a jury question on some of the counts as to the defendant Hartzel, the judgment as to him is affirmed. As to the defendant Soller, it is reversed.

[File endorsement omitted.]

[fol. 184] In United States Circuit Court of Appeals, Seventh Circuit

* * * * * * *

No. 8253

The United States of America, Plaintiff-Appellee,

vs.

Elmer Hartzel, Defendant-Appellant

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Judgment—October 14, 1943

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

And afterwards, to-wit: On the twenty-fifth day of October, 1943, there was filed in the office of the Clerk of this Court, a Petition for Rehearing.

. . . . . .

[fols. 185-202] Petition for rehearing, covering 15 pages, omitted from this print. It was denied, and nothing more by order of Nov. 10, 1943.

[fol. 203] In United States Circuit Court of Appeals, Seventh Circuit

[Title omitted]

Order Denying Petition for Rehearing—November 10, 1943

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, denied.

In United States Circuit Court of Appeals

[Title omitted]

Order Staying Mandate—November 12, 1943

On motion of counsel for appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

. . . . . .

[fol. 204] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

DESIGNATION OF PORTIONS OF RECORD—Filed November 16, 1943

To Kenneth J. Carrick, Clerk of the U. S. Circuit Court of Appeals, 1212 Lake Shore Drive, Chicago.

Please prepare Transcript of Record for use on petition for certiorari to the Supreme Court of the United States, and include therein the following:

1. Printed Transcript of Record of the District Court.
2. Order, showing argument of cause and case taken under advertisement.
3. Opinion of Court.
4. Order of Affirmance.
5. Printed Petition for Rehearing.
6. Order denying Petition for Rehearing.
7. Order staying mandate of the Court.

Ode L. Rankin, Benedict J. Short, Attorneys for Appellant.

[fols. 205-206] STATE OF ILLINOIS,
County of Cook, ss:

Gwendolyn Steel, being first duly sworn, deposes and says that she served the foregoing Designation of Portions of Record upon the attorney for Plaintiff-Appellee, by mailing a true copy thereof to him, proper postage prepaid, in an envelope, addressed as follows: J. Albert Woll, Esq., U. S. District Attorney, Federal Court House, Chicago, Illinois, that she deposited said envelope in a United States mailbox located in the building at 134 North LaSalle Street, Chicago, Illinois, on November 15, 1943.

Gwendolyn Steel.

Subscribed and sworn to before me this 15th day of November, A. D. 1943. Bessie Belencak, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 207] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 208] SUPREME COURT OF THE UNITED STATES

* * * * * * *

ORDER ALLOWING CERTIORARI—Filed January 10, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 209] IN THE SUPREME COURT OF THE UNITED STATES

* * * * * * *

STIPULATION AS TO PRINTING OF THE RECORD—Filed January 27, 1944

It is hereby stipulated by and between the Solicitor General on behalf of the respondent and Ode L. Rankin, attorney for the petitioner, that in order to reduce the cost of reprinting the record for use on writ of certiorari, the Clerk in reprinting may omit the following from the printed record filed with the petition for a writ of certiorari:

(1) The title of cause No. 8264—*United States v. Elmer William Soller*—From the title page of the record filed in the circuit court of appeals;

(2) The name of Delphine Reich and the lines "Government's Exhibit 31—Statement of Elmer William Soller" on page i of the index to the record filed in the circuit court of appeals, and the lines "Elmer William Soller," "Judgment as to Soller," "Notice of Appeal of Soller," "Assignment of Errors on behalf of Soller" on page ii;

(3) Page 23, line 18, in the third paragraph, beginning with the sentence, "I tried to find out who sent these articles through the mails," to page 28, line 25, ending with the words "The Diseased Spinal Cord," which conclude the second full paragraph on that page;

[fol. 210] (4) Page 29, beginning with the line "*Cross Examination by Mr. Powers*" (folio 56), to page 32 down to the line "*Cross Examination by Mr. Short*" (folio 60);

(5) Page 34, fifth line from the bottom, beginning "Thereupon," to page 42, folio 68;

(6) Page 42, folio 69, to page 45, folio 72;

(7) Page 67, folio 99, to page 69, folio 102;

(8) Page 81, folio 118, the lines "As to Soller Only" and "Exhibits 31, 32, as to Soller only";

(9) Page 95, folio 142, to page 123, line 14, ending with "keep it on the Q. T.";

(10) Pages 158 to 162, inclusive;

(11) Page 184, second line from the bottom, the clause "which said petition is in the words and figures following, to wit";

(12) Pages 185 to 201, inclusive;

All as indicated in the attached copy of the printed record filed with the petition for a writ of certiorari.

It is further stipulated that either party may refer in the briefs and on the oral argument to any portion of the certified record filed with the petition for writ of certiorari which is not required to be reprinted pursuant to this stipulation.

Ode L. Rankin, Attorney for Petitioner. Charles Fahy, Solicitor General.

January 1944.

[fol. 211] [File endorsement omitted.]

Endorsed on cover: Enter Ode L. Rankin, File No. 48,024, U. S. Circuit Court of Appeals, Seventh Circuit, Term No. 531. Elmer Hartzel, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed December 10, 1943. Term No. 531 O. T. 1943.

FILE COPY

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DEC 10 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 531

ELMER HARTZEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION and BRIEF.

ODE L. RANKIN,
BENEDICT J. SHORT,
Counsel for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No.

ELMER HARTZEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI.

Petitioner Elmer Hartzel respectfully shows to the court as follows:

That he is a resident of the County of Cook and State of Illinois and is a citizen of the United States, born at New Castle, Pennsylvania, on September 9, 1892, of native-born parents.

That he was sentenced by the District Court of the United States for the Northern District of Illinois, Eastern Division, on February 8, 1943, to a term of five years upon an indictment charging violation of sections 33 and 34 of Title 50, United States Code, being sections 3 and 4 of the Espionage Act.

That on appeal from said judgment the Circuit Court of Appeals for the Seventh Circuit, on October 14, 1943, affirmed said judgment; and on November 10, 1943, denied a rehearing of said cause.

Summary Statement of Matter Involved.

On December 18, 1942, the Grand Jury returned an indictment in the said District Court charging Elmer Hartzel, petitioner, one Elmer William Soller and one Newell Mecartney, with violation of the Espionage Act by preparing and publishing certain articles with intent to bring about conditions violative of section 3 of the Espionage Act, and conspiring to do so.

The indictment contained seven counts, six of which charge substantive offenses and the seventh count charging conspiracy to commit the substantive offenses charged.

The defendants pleaded not guilty, were tried by a jury, and all were found guilty,—petitioner Hartzel upon all counts and the defendants Soller and Mecartney upon counts 5, 6 and 7.

On motion for new trial, defendant Newell Mecartney was granted a new trial and discharged.

Motions for directed verdict, motion for new trial and in arrest of judgment were denied with exceptions and a bill of exceptions was presented.

On appeal, it was held that there was not sufficient proof to sustain the judgment as to Soller and that he was entitled to have had a directed verdict, and the judgment as to Soller was reversed and he was discharged.

The Circuit Court of Appeals then affirmed the judgment as to petitioner Elmer Hartzel, and on petition for a rehearing the opinion and judgment were adhered to and the petition for rehearing was denied on November 10, 1943.

The Indictment.

The charges are based on the preparation, publishing, circulating and distributing among persons eligible and available for recruiting and enlistment services in the military and naval forces of the United States, certain articles entitled: (1) The British: An Inferior Breed; (2) The Jew Makes a Sacrifice: The Forthcoming Collapse of America; and (3) A document not named in the charges but afterwards known in the evidence as: The Diseased Spinal Cord.

Counts 1, 3 and 5 charge, respectively, that, the United States being at war, the defendants did unlawfully, wilfully, knowingly and feloniously obstruct the recruiting and the enlistment service by preparing, publishing, circulating and distributing the said articles (one of which is named in each count) to available and eligible persons, which articles, it is charged, were, by defendants, intended to induce such available persons to fail and refuse to

enlist, and to refuse to submit to registration under said Act for services in the military and naval forces of the United States contrary to the form of the statute, etc.

Counts 2, 4 and 6 charge in apt terms, respectively, also like acts and intentions to cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the naval and military forces of the United States by preparing, publishing, circulating and distributing the said respective articles, one of which articles being the basis of each count, contrary to the statute, etc.

Count 7, the conspiracy count, charged conspiracy among the defendants to violate the provisions of Section 33 of said Act.

Statement of the Facts.

The facts out of which this prosecution arose may be briefly stated as follows: The defendant Elmer Hartzel, prior to the entry of this country into its present war, composed certain articles of a controversial and political nature, which he mailed out to persons on a mailing list which he had prepared for that purpose.

His mailing list was composed of headline personalities, prominent persons in the political, social and fraternal world, societies, organizations, etc., which he had largely gathered from newspapers, directories, almanacs, etc.

After Pearl Harbor Hartzel composed three articles of like nature which were mailed out in like manner, upon which the first six counts of the indictment are based.

Hartzel had his articles mimeographed at the shop of the defendant Soller, whose place of business was in the office of defendant Mecartney, who was joined in the indictment. Hartzel had no connection with Soller except the business relationship. Soller had nothing to do with the composition or distribution of the articles. He printed them and received his pay. Soller sub-let space in a suite of rooms owned or controlled by Mecartney.

Mecartney was held by the Trial Judge after verdict to be a by-stander and he was granted a new trial. The Circuit Court of Appeals reversed the case as to Soller.

It was not denied that Elmer Hartzel was the author of all of the articles in question and that he mailed them out personally and no person was interested in the matter of composing or mailing them, other than he.

The Articles Set Out in the Indictment.

Three articles are set out in the indictment, upon the composition, printing and distribution of which the crimes were charged. These three articles were composed, mimeographed and mailed out after Pearl Harbor. The article declared upon in Counts 1 and 2 entitled "The British: An Inferior Breed" (Tr. 3), and the article set up in Counts 3 and 4 entitled "The Jew Makes a Sacrifice: The Forthcoming Collapse of America" (Tr. 6), were written by Hartzel in the spring of 1942, mimeographed by Soller and mailed out by Hartzel in June, 1942. The article called "The Diseased Spinal Cord," portions of which are set out in Counts 5 and 6 (Tr. 10), and in full (Tr. 73), was written by Hartzel in July, 1942, mimeographed by Soller and mailed out by Hartzel in August, 1942.

The Court will find the articles entitled The British an Inferior Breed printed in full in Count 1 of the indictment, Transcript page 3, and also at page 70. The article entitled The Jew Makes a Sacrifice: The Forthcoming Collapse of America, is set out in full in Count 3, at page 6, and again at page 71; and excerpts of The Diseased Spinal Cord are set out in count 5 at page 10 and is in full at page 73 of the Transcript. The articles are quoted in part in the opinion of the Circuit Court of Appeals (Tr. 175).

Hartzel's Mailing List.

The defendant Hartzel had a mailing list of headline personalities, societies and organizations to whom he mailed out the several articles introduced in evidence. Hartzel commenced compiling this list in January, 1941, at the time he wrote the first article in question, and wrote the article Revolution Will Come to America (Govt's Ex. 60, Tr. 88-95). He finally had a mailing list of 750 names, but at no time was more than 600 documents sent out (Tr. 126). This list consisted chiefly of prominent people, Congressmen, Representatives and Senators. The type of persons was prominent, representative people. As time passed he began to eliminate a number of Representatives and Senators. Out of the World Almanac he got the names of patriotic societies such as Daughters of the Revolution. We the Mothers Mobilize, a list Hartzel considered patriotic organizations; it included fraternities, sororities and organizations of that type; the National Committee of America First, and of Frank J. Loesch, and bishops, and church representatives (Tr. 126-127). The names were compiled from various sources, names of prominent personages,

such as associations and fraternities taken from the World Almanac; from a government publication containing a list of labor unions; persons engaged in the America First Committee whose names were in the headlines; American Legion, State and District Commanders whose names were taken from telephone directories at the Public Library, etc. (Tr. 79).

In composing and the mailing out of these letters, Hartzel had no assistance (Tr. 80, 130, 131).

Persons to Whom Articles Were Mailed.

The Government proved that the three articles declared upon had been received through the mail by certain persons and organizations, as follows:

1. The United States Infantry Association, publishers of the Infantry Journal, a service publication (Tr. 18).

2. Major General H. H. Arnold, Commanding General of the United States Army Air Force, War Department, Washington, D. C. (Tr. 19).

3. Joseph Huckins, Lt. Col. of the General Staff Corps, U. S. Army, San Antonio, Texas, testified to the receipt of articles in an envelope addressed to Colonel Hastings, Chief of the Military Intelligence Division (Tr. 19).

4. Franklin Bliss Snyder, President of Northwestern University (Tr. 20).

5. American Newspaper Publishers, 360 North Michigan Avenue, Chicago (Tr. 20).

6. Kiwanis International (Tr. 21).

7. Lions International (Tr. 21).

8. Air Line Pilots Association (Tr. 22).

9. American Legion Department of Illinois (Tr. 22).

The indictment in this case sets out a special set of facts which are charged to have been accompanied with a special intent to accomplish a definite objective, to wit, the disruption of morale and the thwarting of enlistment.

It was contended below that the character of those allegations raised issues of *specific, actual, guilty* intent which the Government was bound to prove as laid; that it was not enough to say that a presumption could be indulged from the face of these documents and that from such documents defendants might be presumed to intend any natural and probable results of the language used; that in a criminal case a specific intent is not to be presumed from the wording of documents which on their face do not show a specific intent.

It was the contention of counsel for Hartzel during the trial that the charge in the indictment required proof of a specific intent in the mind of Hartzel by extraneous evidence that the articles should accomplish the objectives charged; and that he could not be convicted unless he did actually and specifically so intend; and at the conclusion of the evidence urged that the jury should be so definitely instructed.

So, before the Court commenced its charge to the jury, counsel for Hartzel asked the Court to instruct the jury in substance as follows:

> "That the things alleged in the indictment to have been done by the defendants in the matter of

alleged interference with the enlistment and recruiting service and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but the defendants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific, intention accompanied said acts." (Tr. 133-134)

But the Court did not charge as requested and in its main charge to the jury told them that they were at liberty to infer from all the circumstances in the case,—the language used, the probable result of the language used, and circumstances under which the documents were issued, intent to produce the results charged (Tr. 138).

After the charge was delivered, counsel for defendant called the attention of the Court to his request for an instruction as to specific intent as it applied to the case, but the Court refused to so charge the jury, allowed an exception and further charged the jury as follows (Tr. 145):

"It is necessary for the Government to prove that the defendants intended to interfere with the enlistment and recruiting services, and intended to cause insubordination; that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used" (Tr. 145).

In this we assert the Court erred and that our exception to the charge on the subject of intent should be here sustained.

Articles Written Before Pearl Harbor.

The Court admitted in evidence, upon the theory that they were relevant to the issue of intent, seven pre-war articles composed by Hartzel, three of which were shown to have been mailed out prior to Pearl Harbor. These exhibits are as follows: Exhibit 60, "Revolution will come to America," composed in January, 1941 (Tr. 77); Exhibit 45, "Roosevelt's Illness," written early in 1940 (Tr. 83). The two other articles admitted were not shown to have been mailed out and no date of their composition was shown. These articles were Exhibit 46, "Roosevelt's Infantile Paralysis" (Tr. 85), and Exhibit 47, "The Condition of Our Leader" (Tr. 88).

It is contended that the court erred in admitting in evidence the five articles written by Hartzel before Pearl Harbor over objection. They were irrelevant and incompetent and highly prejudicial.

Three of these five articles were written by Hartzel in the year 1941, namely "The Blood Sacrifice" (Tr. 81); "Roosevelt's Illness" (Tr. 83), and "Revolution Will Come to America" (Tr. 88-94). These articles, together with two other articles, the date of composition of one of which is unknown, were admitted in evidence on the theory that they were relevant to the issue of intent; but, when they are read they show that if we had been at war when they were written and mailed they would not have been any violation of the sedition law. "The Blood Sacrifice" is an article devoted exclusively to criticism of the Jew. The article "Roosevelt's Illness", written in 1940 (Tr. 83), is a dissertation upon the well known illness of Mr. Roosevelt and interpreting that illness along psychological and political lines: "Roosevelt's Infantile Paralysis" is another psycho-political article: "The Condition of Our Leader" is a third article dealing with the psychology of the President as influenced by his physical condition: the article "Revolution Will Come to America", was composed in 1941. The court told the jury he had allowed them in evidence on the question of intent. The court said:

> "Some other documents have been admited in evidence in this case that are not referred to in the indictment, the documents, I believe, that were issued before this war started, before December 8, 1941, and it was not criminal then to publish any such documents even though for any purpose. The statute that I read to you refers to activities when the nation is at war. Those are admitted in evidence, not as proof that the defendants were guilty of any acts or violation of the statute in publishing them at that time but simply on the question of whether you believe from the fact that they issued such documents and had expressed such opinions at the time when they issued these documents, the documents here, men-

tioned in the indictment, whether, when they issued those documents, they intended to interfere with enlistment and recruiting in the service or cause insubordination or disloyalty to the army."

It was also contended that prior to the war status these articles were entirely within the constitutional privilege and the assumption of a war status did not make these documents competent to prove a felonious intent allegedly entertained in composing and mailing out other writings after the war began; that if they were innocent compositions when written they were innocent when admitted and shed no guilty light upon subsequent events.

Judgment and Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals rendered in this cause is reported as *United States* v. *Hartzel*, 138 Fed. (2d) 169 (Advance Sheet No. 3, November 29, 1943).

The Circuit Court of Appeals reversed the case as to Elmer William Soller who had been convicted under Counts 5, 6 and 7 and affirmed as to petitioner Elmer Hartzel.

The holding of the Court was to the effect that the test as to what constitutes a seditious utterance is not to be limited merely by those cases where a direct appeal is made upon the face of the document in question and said (Tr. 181):

> "If the condemned utterance is reasonably calculated to produce the prescribed result the purpose and motive is within the province of a jury."

On the question of specific intent the Court sustained the viewpoint of the trial court that a specific intent was

provable by the same type of proof as a general intention, i.e., that it is provable by presuming that the defendant intended the natural and probable consequences of his acts; that is by reasoning from effect to cause instead of from cause to effect.

In thus holding it is contended the Circuit Court of Appeals usurped the functions of the jury by deciding that defendant Hartzel mailed out the articles with a specific intent that their effect should be to create the conditions charged in the indictment, injure the morale and create insubordination, and thus invaded the province of the jury by deciding a question of fact which the defendant had a right to have passed upon by the jury and which was kept from the jury.

Jurisdiction.

This Court has jurisdiction to review this cause under Section 240 of the Judicial Code and Section 688, Title 18, Criminal Code and Criminal Procedure, and Rules 11 and 12 of Criminal Procedure of this Court (U. S. C. A. Cumulative Annual Pocket part to Title 18).

Questions Presented.

Where the documents written are alleged to have been published with the specific intent to interfere with the enlistment service of the armed forces and to cause and attempt to cause insubordination, mutiny and refusal of duty in the military and naval forces; and where upon their face the articles have no reference whatever to the military forces or the draft, selective service, recruiting

or enlistment, and no proof is made of any such intent or purpose in the defendant's mind, independent of the articles themselves, is the jury warranted in finding the defendant guilty?

Is the constitutional right of freedom of speech interfered with by rendering judgment upon such verdict and imprisoning defendant upon such judgment?

Was the province of the jury invaded and its function usurped by the Circuit Court of Appeals by its holding that a specific intent appears in the evidence and affirming instead of reversing the judgment, when the trial court kept that very question from the jury by refusing to so instruct them upon request?

Did the Court err in allowing in evidence articles written when we were at peace, admittedly innocent and protected by the constitutional right of freedom of speech, where the issue developed was whether the same type of articles were charged to be seditious because of a subsequent state of war coming into existence?

Reasons Relied Upon for the Allowance of the Writ.

I.

There is no reference to the draft, recruiting service, conscription, or volunteer service upon the face of the articles and the Government made no proof of a specific intent to violate the law outside of mailing the documents themselves.

In all of the sedition cases found passed upon by this Court the documents published have some specific reference to the draft, the recruiting service, conscription,

volunteering, or selective service, in such manner as to indicate a specific intent to injure the morale of the forces or cause insubordination, etc.; but in no case found has it ever been held that a defendant may be found guilty because such results might indirectly result from publication of documents with no such reference upon their face and where there was no proof of a guilty intent otherwise made in the record.

Defendant was writing a series of articles which were not seditious prior to this war; after the war the articles declared upon in the indictment were written and upon the trial the court allowed the prior articles, innocent when written, to be received in evidence on the question of whether defendant had a guilty intent when he published like articles after we were at war. Because of the nature of the articles it was highly prejudicial.

II.

The defendant's constitutional right of freedom of speech was interfered with by the rulings of the court and judgments upon the verdict and on appeal.

It was assigned as error (Tr. 166) and argued that defendant's constitutional rights were invaded by the judgment and the Circuit Court of Appeals ruled on its opinion (Tr. 180) that the articles were not privileged as free speech.

III.

The Circuit Court of Appeals by its judgment in affirmance deprived defendant of his right of trial by jury in deciding a question of fact withheld from the jury by the trial judge.

Specification of Errors.

The trial court erred in not directing a verdict of not guilty; in receiving improper evidence; in instructing the jury improperly and refusing to instruct the jury as requested.

The Circuit Court of Appeals erred in affirming the judgment.

Wherefore it is respectfully requested that this petition for a writ of certiorari be allowed and that the writ be granted to review the judgment of the Circuit Court of Appeals for the Seventh Circuit

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the Circuit Court of Appeals rendered in this cause is reported as *United States* v. *Hartzel*, 138 Fed (2d) 169 (See Advance Sheet No. 3, November 29, 1943).

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, Section 688, Title 18, Criminal Code and Criminal Procedure and Rules 11 and 12 of this court governing criminal procedure (U. S. C. A. Cumulative Annual Pocket part Title 18).

The order of the Circuit Court of Appeals became final on November 10, 1943, on which date it denied the petition for rehearing (Tr. 203).

ARGUMENT.

I.

Where the Article Charged to Be Seditious Shows No Specific Intent Upon Its Face Its Publication Alone Does Not Violate the Act.

It is our contention that where nothing appears upon the face of the articles showing a specific intent to commit the crimes charged and no evidence is introduced by the Government to show the criminal and specific intent, inherent in the crime charged, such crime is not proven; and that the presumption of innocence is not overcome, and reasonable doubt still exists; and that the true rule is that where on the face of the circulated document no specific intent appears to commit the very crime charged and no proof is made otherwise by the Government to give the document such an intent, then no crime is proven, as the document is the means charged, and, when proven, it supplies no evidence of intent.

In the leading cases which have reached this court, the specific intent appeared in the language of the written documents, which together with proof of the mode of distribution and the persons among whom distributed was held to support convictions.

We analyze those cases for purposes of illustration.

In the first three cases reaching the high Court, all argued in January 1919, there was no dissenting opinion. All three of these cases, *Schenck* v. *U. S.*, 249 U. S. 47, *Frohwerk* v. *U. S.*, 249 U. S. 204, and *Debs* v. *U. S.*, 249 U. S. 211, were affirmed and Mr. Justice Holmes wrote

the opinions of the Court in all of them, and in the *Schenck* case stated a general rule by which to decide such cases which we hereinafter quote. First we will analyze those three cases.

In the *Schenck* case (arising under the Act of June 15, 1917), the medium used for distribution of statements was leaflets in which there was specific reference to the draft, stating, among impassioned utterances, that: "A conscript is little better than a convict", and that conscription was "despotism in its worst form."; and the class of persons among whom the leaflets were distributed was men who had passed exemption boards, drafted men. In the *Schenck* case the Court laid down the general rule for the decision of such sedition cases, as follows:

> "The question in every case is whether the words used were used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that congress has a right to prevent. It is a question of proximity and degree." (p. 52).

In the *Frohwerk* case the medium of distribution was the Missouri Staats Zeitung, a newspaper published in a metropolitan center, and the articles therein, on which the charges were based, bore upon their face specific reference to the draft service and resistance to it. There was no bill of exceptions (*Ex parte Frohwerk*, 248 U. S. 540), to show excusing circumstances, so the case was decided upon the nature of the medium used, the persons possible to be reached by that medium, and the character of the articles published. The court visioned possible defenses (p. 208), but as they were not in the record the case was affirmed with the hesitating statement, and apparently against mental inclination, that:

> "We are driven to the conclusion that the record shows no ground upon which the case can be reversed." (p. 210).

In the *Debs* case the medium of communication was a public speech to a concourse of people in which Debs openly advocated resistance to the draft and praised and sympathized with others who had been convicted and imprisoned because of resistance to the draft. Again, Debs addressed the jury in his own behalf, and reiterated his public statements in challenging terms, to the distress of his counsel (p. 215). So, the medium of communication being ample, and the statements openly obnoxious and defiant, the Supreme Court affirmed the judgment.

All three of the cases, *Frohwerk*, *Schenck* and *Debs*, were affirmed,—the *Frohwerk* case, because there the articles referred to the draft in a derogatory manner and there was no bill of exceptions; the *Debs* case because Debs stood before his jury and defiantly iterated, reiterated, and affirmed his seditious utterances leaving the Court helpless to aid him; and the *Schenck* case because the documents circulated called conscription a monstrous wrong and advised the persons circularized,—men who had passed exemption boards, to assert their rights and not to submit to intimidation.

But out of these cases is to be drawn these essentials,—that the document must be of such nature that it is calculated to create the injury prohibited; the means of circulation must be ample to reach the class of service men or draftees, and the persons reached must be the type on whom the statements would react "to the injury of the service of the United States", for it is clear the law is not aimed at isolated cases, but at causing insubordination, etc., in the "*forces*", and obstruction to the "recruiting or enlistment *service*".

The Cases in Which Dissenting Opinions Were Filed.

After the unanimous opinions in the three cases, *Schenck, Frohwerk* and *Debs,* were filed, there arose three other cases, *Abrams* v. *U. S.*, 250 U. S. 616, *Schaefer* v. *U. S.*, 251 U. S. 466, and *Pierce* v. *U. S.*, 252 U. S. 239, in all of which Justices Brandeis and Holmes filed dissenting opinions. A study of the opinions majority and minority opinions in these cases furnishes a true rule for decision of this case which is that specific intent is sufficiently proven if that intent appears upon the face of the document by direct reference to the draft or enlistment service in a derogatory manner sufficient to cause clear and present danger that the evil Congress sought to avoid will arise.

In the case of *Abrams* v. *U. S.*, 250 U. S. 616, a conspiracy case, the Court in its majority opinion stated that:

> "Men must be held to have intended and to be accountable for, the effects which their acts were likely to produce." (p. 621).

In conspiracy the effect of the acts is not the basis of decisions as we all know, so the language used must be looked at in its setting and not as a rule of decision. The majority opinion there held:

> "• • • the plain purpose of their propaganda was to excite at the supreme crisis of the war, disaffection, sedition, riots and, as they hoped, revolution, in this country for the purpose of embarrassing, and if possible, defeating the military plans of the Government in Europe" (p. 623).

And the Court said:

> "Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established" (p. 618).

The Dissent of Justice Holmes.

Now the dissent of Justice Holmes, joined in by Justice Brandeis, was predicated essentially, at least largely, upon the ground that no *specific intent* had been shown to have been in the minds of the accused to accomplish the *objectives* charged; whereas the majority had held that upon the face of the documents the objective was clear; and that was what the quote from the majority opinion referred to when it said men were to be held to the consequences their acts might produce.

Now in the *Abrams* case Justice Holmes points to the absence of proof of specific intent. He said:

> "But to make the conduct criminal the statute requires that it should be 'with intent by such curtailment to cripple or hinder the United States in the prosecution of the war'. It seems to me no such intent is proved" (p. 626).

The Justice then went on to expound the doctrine of *specific intent*. He said:

> "I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge, at the time of the act, that the consequences, said to be intended, will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law, might be hanged, if, at the time of his act, he knew facts from which common experience showed that the consequences would follow whether he, individually, could forsesee them or not.
>
> But when the words are used exactly, a deed is not done with intent to produce a consequence, unless, that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even

> if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind" (pp. 626-627). * * * "Congress certainly cannot forbid all effort to change the mind of the country. Nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so" (p. 628).

Now the majority opinion of the Supreme Court in the *Abrams* case did not say that the doctrine of specific intent did not apply to such cases, but, what it necessarily held was that the rule that specific intent must be shown was satisfied by the expressions on the face of the papers, quoted in the opinion, such as:

> "Workers of the World, Awake! Rise! Put down your enemy and mine. * * * Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the Government know that not only the Russian Worker fights for freedom but also here in America lives the spirit of Revolution. * * * Workers up to fight" (pp. 620-622).

While the minority opinion was that a specific intent did not appear in the language to accomplish the particular criminal objectives charged in the indictment.

The dispute was over the application of the rule to the facts and not over the rule itself.

In the case of *Schaefer* v. *U. S.*, 251 U. S. 466, there was a dissenting opinion by Justice Brandeis joined in by Justice Holmes. The majority opinion held that the articles published in the Philadelphia Tageblatt, there in question, upon their face showed the intent charged in the

indictment; and we suggest that if that intent were on the face of the paper it would of necessity be specific.

In *Pierce* v. *U. S.*, 252 U. S. 239, there was also a dissenting opinion by Justice Brandeis concurred in by Justice Holmes. The case involved the distribution of a pamphlet entitled "The Price We Pay". In Baltimore, District Judge Rose had ruled its circulation was not illegal and discharged the accused by a directed verdict. The distribution of some 5000 copies was then made by persons in Albany among whom was Pierce. It was held by the majority opinion:

> "It was shown without dispute that the defendants distributed the pamphlet—The Price We Pay—with full understanding of its contents; and this of itself furnished a ground for attributing to them an intent to bring about, and for finding that they attempted to bring about, any and all such consequences as reasonably might be anticipated from its distribution" (p. 249).

Thus the majority opinion is founded upon the idea that the specific intent appeared upon the face of the document itself (p. 249), which openly denounced the drafting and recruiting of sons when they grew up to soldier size, and age after age, mounting up and up (pp. 245-246). That this was so is emphasized by the statement in the minority opinion that "the leaflet is unaffected by extraneous evidence which might give to words used therein special meaning or effect" (p. 256).

The dissenting opinion further said concerning the charge that the defendants conspired and attempted wilfully to "cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces" that:

> "No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been

said in respect to the third count as to the total lack of evidence of evil intent is equally applicable here.

"A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces" (p. 273).

The Lesson to Be Learned From the Conflict of Opinion in Sedition Cases.

Out of the several Supreme Court cases cited by opposing counsel it is thought this much is obvious: That the majority of the Supreme Court were of opinion that where, upon the face of the writings distributed, there appeared specific references to the draft and recruiting, advising resistance, etc., that was evidence of specific intent; which, instead of militating against the proposition which we have here advanced really, and in fact, sustains our point of law made here that where nothing appears upon the face of the paper pointing to the crime charged and no evidence is introduced to furnish the criminal and specific intent, inherent in the crime charged, the crime is not proven; the presumption of innocence is not overcome, the reasonable doubt still exists.

We respectfully suggest that the true rule is that where on the face of the circulated documents no specific intent appears to commit the very crime charged and no proof is made by the Government to give the document such an intent, then no crime is proven, as the document is the means charged, and it supplies no evidence of intent.

II.

The Government Failed to Prove the Issues It Created in Its Indictment and Defendant's Right to Freedom of Speech Under the Constitution Was Invaded By the Conviction.

We commence this section with the suggestion that statements used in writings are protected by the freedom of speech provision of our Constitution up to the point where tolerance must end and self-preservation must begin; where government must assert its paramount right to its life and existence; to a point where, as has been said, a citizen creates a danger clear, present and imminent.

If, upon their face, such writings as are here in question are equivocal and indecisive, the presumption of innocence and reasonable doubt safeguard the defendant until proof by the Government shows that acts of the defendant have created a clear and present danger. There is no presumption of law or fact that a defendant has gone too far in exercising his basic right to freedom of expression. The Government must prove its allegation that he has exceeded his constitutional allowance of liberty and prove that fact beyond reasonable doubt.

The Charges Should Be Proven As Alleged.

Where writings are not clearly and unmistakably seditious, proof *dehors* the instrument is required to support the charge that they are and that the writings were published and circulated to effectuate the seditious intent alleged; otherwise there would be no constitutionally

protected right to expression; otherwise it would cast the burden upon the citizen to prove he was within the constitutional protection instead of upon the Government to prove he had gone beyond his constitutional guaranty.

The documents declared upon, do not, upon their face, contain any reference to the recruiting, enlistment or draft whatever. There is only expression of racial criticism, political opinions, expressions concerning governmental policies, and derogatory remarks but not one word advocating resistance to draft, discouraging enlistment or recruiting, counseling insubordination, disloyalty, mutiny or refusal of duty.

There is not upon the face of these documents any indication of an affirmative effort or intention to obstruct the war effort as such.

Nor is there in the articles any exhortation to eligible persons; nor pleas to induce those already inducted into the service to mutiny, or refuse to do military duty, or to become insubordinate, or disloyal to the Government. No such thing was proven by the Government nor did the Government attempt to prove an attempt.

The documents, not furnishing, in and of themselves, positive and conclusive evidence of such obstruction of recruiting and enlistment service, or attempt to destroy morale, proof of such objectives must be found, if at all, in the record otherwise made by the Government.

But the Government proved only that the articles were mailed to representative persons in the public headlines and to societies, unions, clubs, papers and officials of

Congress, etc., and that such people and organizations were the elements or stratum of society into which the documents were sent.

There was no proof made that the articles were distributed among the armed forces or persons eligible for the selective service or persons eligible to enlist in the service, with animus and intent to stall the recruiting service or break down the morale of the armed forces.

Hartzel's Mailing List Was Headline Personalities.

The statement taken from Hartzel by F.B.I. Agent Carroll (Tr. 75-81) shows in what manner Hartzel made up his mailing list and the types of personages to whom his writings were sent. He obtained his names from various sources. From World Almanac he obtained the names of various prominent personages, associations and fraternities; from a Government list, certain labor unions; from newspapers, the names of persons engaged in America First Committee activities; from telephone directories, the names of State and District Commanders of the American Legion; and he mailed to such organizations as Daughters of the American Revolution and We the Mothers Mobilize (Tr. 79). His mailing list of 750 was made up mostly of prominent people and a large portion were sent to congressmen, senators and other representatives. The type reached and intended to be reached was prominent, representative people (Tr. 126). The proof on this was affirmative and no other indication is in the record.

In making its proof, the Government proved that Hartzel had mailed his articles to the United States In-

fantry Association, publishers of the "Infantry Journal," the Major General of the United States Army, Chief of the Military Intelligence Division, the President of the Northwestern University, the American Newspaper Publishers, Kiwanis International, Lions International, Air Line Pilots Association, American Legion Department of Illinois (Tr. 19-22). These are, of course, a select list and the army officers or employees were brought here to testify. But it all adds up to a list of top ranking personages, heads of movements, and political and social organizations, which disproves the allegation that the articles were directed toward obstruction of the war effort by specifically circularizing those persons inducted into the armed forces and persons eligible therefor.

There was no proof of a specific circulation of the articles among eligible draftees, or volunteers, or those already inducted, nor that such was intended; so that the record speaks that there was no specific or actual intent to obstruct recruiting or enlistment or destroy morale in the manner or method of distribution of the articles.

The fact that after reading the articles, some one may have incidentally turned away from volunteering, or a member of the armed forces have gone A.W.O.L., is not the test. Such action might result from the most innocent statements of any one or some special urge; but that is not the test; the law is only violated by wilfully obstructing the recruiting or enlistment service, or wilfully causing or attempting to cause the breakdown of morale of which the Government made no proof. Injury to the *service* is the language of the law.

Nor is there in the articles any exhortation to eligible persons; nor pleas to induce those already inducted into the service to mutiny, or refuse to do military duty, or to become insubordinate, or disloyal to the Government. No such thing was proven by the Government nor did the Government attempt to prove an attempt.

The effect is that the defendant was convicted for having written and mailed the articles; for the act not the intent with which the act was done; and no intent, general or specific, to do injury to the military or war service of the United States in the manner charged was shown to have been in Hartzel's mind when he penned the articles and mailed them out. Wilfulness and the evil intentions alleged, were not proven, and without them no crime was proven.

Without proof of a wilful purpose,—which means an affirmative, stubborn intent and purpose existing in the mind to cause insubordination, disloyalty, mutiny or refusal of duty, or to wilfully obstruct the recruiting or enlistment service,—the law cannot be said to have been violated. The Government did not show such a condition of mind. Hence it showed no crime.

A General Intent Is Not Sufficient. Specific Intent Is Essential.

If the Government here contends, as it did on trial, that a presumed intent, *i.e.*, that a person is presumed and bound to intend natural and probable consequences of his acts, is all that is necessary to prove the intent here alleged,—a wilful felonious purpose, then we reply that the Government proved no actual consequences and

the argument is sophistry. Effect must be shown before a cause can be said to exist or become material. If there are no consequences, no effect, no cause can exist, all of which is axiomatic.

There can be no question but that the very essence of a criminal attempt is an existing specific intent. (16 Corpus Juris 113.) To attempt is to specifically intend, and try.

The allegation that insubordination, etc., was wilfully caused and recruiting, etc., wilfully obstructed, includes a specific intent; and the allegation that the articles were prepared and mailed with a certain named intent, purpose and objective is not satisfied by presumptive proof, for it alleges a specific intent.

A defendant's constitutional right is not to be taken away by some technical evidentiary presumption relied upon in lieu of proof.

Therefore we conclude that the Government proved only that Hartzel wrote the articles and that they were sent to certain persons, and no more; and that the Government therefore failed to show facts sufficient to take the case into the field of apparent danger clear and imminent, and which only would overcome the right of defendant to that quantum of freedom of speech and press guaranteed by the First Amendment to our Constitution.

For the error in refusing to direct the jury to find defendant not guilty, the judgment should be reversed.

III.

It Was Error to Instruct the Jury That the Defendant Was Presumed to Intend the Natural and Probable Consequences of His Acts and Language in a Case Involving a Specific Intent, and an Ambiguous Writing.

It is contended that the court erred in instructing the jury as to the proof of the intent with which the documents were prepared and disseminated through Hartzel's mailing list.

It was the contention of counsel for Hartzel during the trial that the charge in the indictment required proof of a specific intent in the mind of Hartzel that the articles should accomplish the objectives charged; and that he could not be convicted unless he did actually and specifically so intend; and at the conclusion of the evidence urged that the jury should be so definitely instructed.

So, before the Court commenced its charge to the jury, counsel for Hartzel asked the Court to instruct the jury in substance as follows:

> "That the things alleged in the indictment to have been done by the defendants in the matter of alleged interference with the enlistment and recruiting service and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but the defendants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some

one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific intention accompanied said acts" (Tr. 133-134).

But the Court did not charge as requested and in its main charge to the jury told them that they were at liberty to infer from all the circumstances in the case,—the language used, the probable result of the language used, and circumstances under which the documents were issued, intent to produce the results charged (Tr. 138).

After the charge was delivered, counsel for defendant called the attention of the Court to his request for an instruction as to specific intent as it applied to the case, but the Court refused to so charge the jury, allowed an exception and further charged the jury as follows (Tr. 145):

"It is necessary for the Government to prove that the defendants intended to interfere with the enlistment and recruiting services, and intended to cause insubordination; that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used and you are at liberty to presume that the defendants intended the natural and probable result of the language used" (Tr. 145).

We call the attention of the Court to the following quotation from the opinion of this Court in the case of *Debs* v. *U. S.*, 249 U. S. 211, 216, as follows:

> "We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effects to obstruct the recruiting service, etc., and unless the defendant had *the specific intent so to do in his mind.*" (Italics for emphasis.)

Specific Intent Is Involved in the Means Alleged.

The allegation in the counts that the defendants wilfully did cause and attempt to cause insubordination, etc., and did wilfully obstruct, etc., is a charge that might be proven by various types of acts of the defendants. But the indictment goes on further and alleges a certain means through and by which it is said the defendants committed those crimes, *i. e.*, by publication and dissemination of certain articles which were by them *calculated and intended to induce* available and eligible persons to fail and refuse to enlist and submit to registration and *to cause* insubordination, disloyalty, mutiny and refusal of duty, etc. But the face of the documents do not bear out the allegations in the indictment so the Government had the burden of proving the specific intent alleged by other evidence *dehors* the documents.

The rule is that where the circumstances are such that the crime charged must have been done with a specific intent such intent must be alleged in the indictment and must be proved as alleged. (31 Corpus Juris 847, Sec. 461.) And where an offense may be committed in various ways the evidence must establish it to have been committed in the mode specifically charged in the indictment. (31 Corpus Juris 846, Sec. 460.)

The acts charged are said to have been accompanied with a special intent to accomplish a definite objective, to wit, the disruption of morale and the thwarting of enlistment.

Now the character of those allegations raises issues of *specific, actual, guilty* intent which the Government was bound to prove as laid. It was not enough to say that a presumption could be indulged from the face of *equivocal documents*, if they be equivocal, which we do not admit, and that from such documents defendants might be presumed to intend the natural and probable result of the language used.

In a criminal case a specific intent is not to be presumed from the wording of equivocal documents. Extraneous evidence must be introduced, else the documents remain equivocal.

There must be results, consequences, to be answered for before the rule can apply, or one is not supposed to have intended the natural and probable.

But the rule as here applied by the Court was not adapted to the issue created by the Government's charges and was definitely misleading and suggestive of guilt, *i. e.*, the defendant was bound to intend, and hence, could not deny the consequences alleged.

A Criminal Attempt Has No Results Except Failure.

And particularly we urge that the instruction was misleading and completely in error when we consider that Counts 2, 4 and 6 contained the allegation of a criminal attempt, that is, that defendant did cause and attempt to

cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces, as well as having actually caused those conditions in the service.

The books agree that there are three elements in the crime of attempt, (1) the intent to commit the crime; (2) doing of some overt act in part execution of the intent; and (3) failure to consummate the crime (16 Corpus Juris 113).

In proving an attempt to commit a crime, a *guilty* intent must be shown; and it must not only be shown that there was a guilty intent, but there must be a *specific* intent to do the particular thing (1 Bishop's New Crim. Law, p. 466). "To convict one of an attempt to commit a crime, it is necessary to show that the overt act was done with the specific intent to commit that particular crime. Such an intent is essential." (16 Corpus Juris 113.)

As we interpret the holdings, this rule,—that one is presumed to intend the natural and probable consequences of his acts or language; as here said, has no application to criminal attempts for, in the law of attempt there are no consequences; there is only failure. Intent, act, failure.

The Means Alleged in an Indictment Must Be Proven As Laid.

It has always been held that the allegation of the means by which a crime is committed when there is more than one way of commission, is an essential part of the indictment, and being essential, must be proven as laid; and so it is that if the means by which a crime is alleged to

have been committed requires a specific intent, a specific intent must be proven to have accompanied the act and shall not be presumed from the act itself; the step of logic is from cause to effect, and not from effect back to cause.

To illustrate that proof of the means alleged is essential and material, a look at *People* v. *Guedel*, 43 Ill. 226, will interest. There Guedel was acquitted of murder by *shooting* the victim with a gun and was promptly reindicted for the same murder of the same party by *beating* him with the same gun; and it was held on plea of the prior proceeding that the acquittal under the first indictment was no bar to a prosecution under the second. Means is material.

The Action of the Court Lessened the Degree of the Government's Proof.

We think the Court erred in weakening or lessening the degree of proof necessary to establish the Government's case. It alleged the crimes were committed by a means involving a specific intent and we say the Court should have held the Government to strict proof of its allegations, and not given it a short cut to a verdict by way of presumption.

IV.

The Circuit Court of Appeals, in Affirming the Judgment, Has Usurped the Functions of the Jury By Here Deciding the Question of Specific Intent, a Question of Fact Upon Which the Trial Court Refused to Instruct the Jury, and Upon Which the Jury Did Not Pass for That Reason.

We think it obvious that the Circuit Court of Appeals invaded the province of the jury, for the reason that the

trial judge refused to give to the jury the requested instruction as to the necessity of proof of a specific intent to do the prohibited acts, and the question of intent being a jury question, the defendant has not had his day in court upon it. The Circuit Court of Appeals by assuming to decide that fact usurped the function of the jury.

In effect the Circuit Court of Appeals has made itself the jury, has sat upon the rights of the defendant, and, as if it were the jury, has decided a question which the law has entrusted exclusively to the judgment of the jury; and has actually substituted the Court's judgment for that of the jury; for upon that question of fact the jury should have been, but were not, permitted to pass.

We think this Court answered the question in the following quotation from the case of *Pierce* v. *United States*, 252 U. S. 239, 250, as follows:

> "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it *in the mode adopted*, and what were defendants' *motives in doing this*, were questions for the jury, not the court, to decide." (Italics ours.)

And we point out that what was there said was in a case where the documents were replete with statements having direct reference to the recruiting service which are quoted at large in the dissenting opinion at pages 256-264. There, with the documents full of violent language and distributed openly amongst persons likely to be affected, the Court yet considered that the matter was one for the jury, upon the intent. The reviewing court could there itself see the seditious nature of the documents upon their face and yet held that as the jury had the right to pass upon the question of intent involved, the Court would not disturb the judgment of the jury where it appeared that the jury *had passed* upon the intent with which the articles were distributed.

But how different the *Pierce* case is from this case;—there the jury had passed upon the intent where the documents were full of denunciations of drafting and recruiting of sons as they grew to soldier size, distributed among the prospective personnel of the armed forces; so the high court would not undo what the jury had advisedly done. There the Court did not interfere with the right of the jury to pass upon the question of intent, but held it to be the province of the jury so to do, and that the jury *had done so.*

Here the pamphlets were distributed by letter to persons of intelligence, which pamphlets, when examined, make no direct reference to the military or naval forces or the recruiting or enlistment service of the United States; whereas, in other cases cited on hearing, there was specific reference upon the face of the documents from which specific intent could be found, and in none of which was this question raised.

But here the specific intent of the defendant was not permitted to reach the jury upon the question of the circulation of articles having no reference to the armed forces or the service; and this Court has now affirmed the action of the trial judge in denying that right; yet almost in the same sentence, saying that the defendant has that right.

Now it will be noted that there is a wide difference between telling a jury that a defendant might be presumed to intend the natural and probable *result of language used* and telling the jury that the acts of a defendant in such case as this must be done *with an actual specific intention* in mind to commit the *offenses charged in the indictment;* one is general intent, the other specific intent.

The specific intent must come first in point of order as, in attempts, there are no results, (except failure) to be responsible for.

Where the act itself does not *inherently* carry with it the proof of a specific intent a specific intent must be shown by independent proof to have accompanied the act.

Consequences must be in the mental contemplation and purpose of the offender when he does the act; but that is to be proven, not presumed from consequences, for there are none from which to draw a presumption.

So we say that in affirming the judgment, the Circuit Court of Appeals denied the right of trial by jury upon a controlling question of fact in the case, and usurped the functions of the jury to decide the question of fact itself.

Conclusion.

It is respectfully suggested that the question urged is substantial. It is not idle or frivolous. It is a question as we view it of conviction for a crime the defendant did not commit.

Wherefore, we further suggest that the record is such that in the exercise of the discretion reposed in this Court the Writ of Certiorari be granted and the cause reviewed.

All of which is respectfully submitted.

Ode L. Rankin,
Benedict J. Short,
Attorneys for Petitioner.

FILE COPY

In The

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943.

No. 531

ELMER HARTZEL,
Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF OF ELMER HARTZEL, PETITIONER.

Ode L. Rankin,
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Attorneys for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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The Opinions Below.

The opinion of the Circuit Court of Appeals is found in the Transcript of Record at pages 118 to 126 and is reported in 138 Fed. (2d) 169. (See Advance Sheet No. 3 of November 29, 1943).

In the District Court Honorable William H. Holly, trial judge, in passing upon the motions for new trial, filed a memorandum opinion which is found in the Transcript of Record, pages 101 to 109.

Jurisdictional Grounds.

The judgment of the Circuit Court of Appeals became final on November 10, 1943, on which date it denied defendant's petition for rehearing (Tr. 127). The Petition for *certiorari* herein was filed on December 10, 1943. *Certiorari* was granted on January 10, 1944.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Section 688, Title 18, Criminal Code and Criminal Procedure and Rules 11 and 12 of this Court governing criminal procedure. (U. S. C. A. Annual Pocket part, Title 18).

Questions Presented.

(1) Where, in a trial for publishing and disseminating articles with seditious intent, the documents were alleged to have been published with the specific intent to interfere with the enlistment service of the armed forces and to cause and attempt to cause insubordination, mutiny and refusal of duty in the military and naval forces; and where upon their face the articles have no reference whatever to the military forces or the draft, selective service, recruiting or enlistment, and no proof is made of any such intent or purpose in the defendant's mind, independent of the articles themselves, is the court warranted in submitting the cause to the jury, or the jury to find the defendant guilty?

(2) Is the constitutional right of freedom of speech interfered with by rendering judgment upon such verdict and imprisoning defendant upon such judgment?

(3) Was the province of the jury invaded and its function usurped by the Circuit Court of Appeals by its holding that a specific intent appears in the evidence, and that such question is for the jury, and, notwithstanding, affirming the judgment, when the record showed that the trial court had kept that very question from the jury by refusing to so instruct it upon request of defendant?

(4) Did the trial court err in refusing to instruct the jury that the acts charged were done with a specific intent in mind to commit the offenses charged in the indictment?

(5) Did the means of publication of the articles through letter to prominent personalities tend to show a specific intent to reach the armed personnel of the armed forces so as to cause mutiny, insubordination, disloyalty, or refusal of duty or be considered as a means of obstructing the recruiting or enlistment service of the United States?

(6) Did the court err in allowing in evidence articles written when we were at peace, then admittedly innocent and protected by the constitutional right of freedom of speech, where the issue developed was whether the same type of articles had become seditious because of a subsequent state of war coming into existence?

The Statute Involved.

Section 33 of the Espionage Act, under which the defendants were charged in the first six counts of the indictment, was originally enacted in 1917 and as then en-

acted was known as Section 3 and as it then stood, and as it now stands, was and is as follows:

> *"Seditious or disloyal acts or words in time of war.* Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both. (June 15, 1917, c. 30, Title 1, § 3, 40 Stat. 219; Mar. 3, 1921, c. 136, 41 Stat. 1359.)

Specification of Errors.

The trial court erred in not directing a verdict of not guilty; in receiving improper evidence; in instructing the jury improperly and refusing to instruct the jury as requested.

The Circuit Court of Appeals erred in affirming the judgment.

Summary of Argument.

I.

Section 33 of the Espionage Act stands today as it was originally enacted in 1917. In 1918 Congress broadened the Act and in 1921 struck out all of the provisions by which the Act of 1917 had been broadened and reenacted Section 33 as it originally stood.

By these amendments, Congress evidenced an intention to punish only actual obstruction to the recruiting or enlistment service and to punish the actual causing of insubordination, disloyalty, mutiny or refusal of duty, and also to punish an attempt to cause insubordination, disloyalty, mutiny or refusal of duty.

It is contended that the Government failed to show by any evidence the successful accomplishment of the objectives alleged in the indictment, which leaves only one question before the court and that is whether the evidence shows an attempt to cause insubordination, disloyalty, mutiny or refusal of duty; that a criminal attempt is a crime having a specific intent and such specific intent must also be proved strictly as alleged; and the Government having failed to prove any such specific intent, has failed to prove that the defendant attempted to cause insubordination, disloyalty, mutiny or refusal of duty, and hence has failed to prove any crime.

II.

Where one, as here, is charged with sedition under Section 33 of the Sedition Act by preparing, publishing and

circulating allegedly seditious articles among available and eligible persons, intending thereby to induce such persons to fail and refuse to enlist or submit to registration; and with doing so with intent to cause, or attempt to cause, insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces to the injury of the service of the United States: and the documents do not show such specific intent upon their face and the Government does not introduce evidence to show that defendant circulated the documents with the criminal and specific intent inherent in the crime charged, then the crime charged is not proven, the presumption of innocence is not overcome, and reasonable doubt continues to exist.

Where an act is charged to have been done with a specific intent, and the act could be done with more than one specific intent in mind, it is not enough to prove the act and then ask the jury to indulge a presumption in order to find the specific intent in mind; as where an assault may have been made with various intents,—to rob, murder, rape, commit mayhem, larceny, etc., and a defendant, say, is charged with assault to rob and nothing further is proven than the assault; the very crime charged is not proved; and it is not proper to tell the jury to presume which intent was present in the defendant's mind as that changes the burden of proof, which always rests with the prosecution.

III.

There is no presumption that a defendant, when charged with seditious utterances, has gone beyond his basic right to freedom of expression; so where the Government has taken it upon itself to charge that he has so done, then it

must prove its allegation as it has laid it; for a defendant's constitutional right to freedom of speech is not to be taken away or denied by some presumption relied upon to take the place of proof. Hence the proof only that Hartzel wrote the articles and mailed them to certain persons proves just that and nothing more, for that has left the jury to presume an intent. When the charge is a crime with specific intent, presumptions are not to be indulged; proof is necessary. General intent to commit *a* crime is not sufficient; specific intent to commit *the* crime is essential.

IV.

The articles when examined contain no reference to conduct prohibited by the Espionage Act and criticism of public officials, however high, is not prohibited by law. Hartzel in writing his articles was looking at war in the abstract and not the specific war being waged. His viewpoint negatives the specific intent charged against him.

V.

The articles written before Pearl Harbor were innocent when written and had no tendency to prove intent to commit a crime under the law which became operative after the war status came into existence.

VI.

Where an act may be done with several purposes, such as assault with intent to commit robbery, mayhem, rape, larceny, etc., and the Government charges the given act was done with a specific purpose or intent, it is not sufficient to prove the act and stop, leaving it to the jury to

presume some intent, but the prosecution must go on and prove the particular intent it has charged. The jury may not presume, nor may the court require the defendant to prove anything.

The means charged is essential and material and must be proven as alleged. The court may not lessen the degree of proof resting on the Government to prove the crime charged nor give the prosecution a short cut to a verdict by way of a presumption.

VII.

The trial court would not definitely instruct the jury that a specific intent was an essential element of the crime, so the defendant did not have his day in court on that fact; and the Circuit Court of Appeals then held that such an intent was a jury question and yet affirmed the judgment; thus effectually taking from defendant the right of trial by jury.

STATEMENT OF THE CASE.

On December 18, 1942, the Grand Jury returned an indictment in the said District Court charging Elmer Hartzel, petitioner, one Elmer William Soller and one Newell Mecartney, with violation of the Espionage Act by preparing and publishing certain articles with intent to bring about conditions violative of Section 33 of the Espionage Act, and conspiring to do so.

The indictment contained seven counts, six of which charge substantive offenses and the seventh count charging conspiracy to commit the substantive offenses charged.

The defendants pleaded not guilty, were tried by a jury, and all were found guilty,—petitioner Hartzel upon all counts and the defendants Soller and Mecartney upon counts 5, 6 and 7.

On motion for new trial, defendant Newell Mecartney was granted a new trial and discharged.

Motions for directed verdict, motion for new trial and in arrest of judgment were denied as to Soller and Hartzel with exceptions and a bill of exceptions was settled and appeals perfected to the Circuit Court of Appeals.

On appeal, it was held that there was not suffiicent proof to sustain the judgment as to Soller and that he was entitled to have had a directed verdict, and the judgment as to Soller was accordingly reversed and he was discharged.

The Circuit Court of Appeals then affirmed the judgment as to petitioner Elmer Hartzel, and on petition for a rehearing the opinion and judgment were adhered to and the petition for rehearing was denied.

Hartzel is in the county jail of Cook County, Illinois, pending the decision here.

The Indictment.

The indictment charges violations of Sections 33 and 34 of Title 50, by this defendant, Elmer Hartzel, said Elmer William Soller and one Newell Mecartney.

The indictment contains seven counts, of which counts one to six are based upon alleged violations of certain

provisions of Section 33 of Title 50; count seven is based upon Section 34 and charges conspiracy to commit the substantive crimes set up in the six preceding counts.

The charges are based on the alleged preparation, publishing, circulating and distributing among persons eligible and available for recruiting and enlistment services in the military and naval forces of the United States, certain articles entitled (1) The British: An Inferior Breed (Govts. Ex. 2, Tr. 49); (2) The Jew Makes a Sacrifice: The Forthcoming Collapse of America (Govts. Ex. 3, Tr. 50; and (3) A document not named in the charges but afterwards known in the evidence as: The Diseased Spinal Cord (Govts. Ex. 15-A, Tr. 52), unlawfully, wilfully, knowingly and feloniously to cause or attempt to cause insubordination, disloyalty, mutiny and refusal of duty and to obstruct the recruiting or enlistment service of the United States to the injury of its service.

Counts 1, 3 and 5 charge, respectively, that, the United States being at war, the defendants did unlawfully, wilfully, knowingly and feloniously obstruct the recruiting and the enlistment service by preparing, publishing, circulating and distributing the said articles (one of which is named in each count) to available and eligible persons, which articles, it is charged, were, by defendants, intended to induce such available persons to fail and refuse to enlist, and to refuse to submit to registration under said Act for service in the military and naval forces of the United States to the injury of the service and contrary to the form of the statute, etc.

Counts 2, 4 and 6 charge in apt terms, respectively, also like acts and intentions to cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty

in the naval and military forces of the United States by preparing, publishing, circulating and distributing the said respective articles, one of said articles being quoted in the preceding count and forming the basis of such count, to the injury of the service and contrary to the statute, etc.

Count 7, the conspiracy count, charges conspiracy among the defendants to violate the provisions of Section 33 of said Act, *i. e.*, that they did conspire to commit the offenses charged in the preceding six counts. Overt acts were charged.

There being now only the defendant Elmer Hartzel before the court the conspiracy count has lost its significance except in this that while all other defendants were let out, the judgment of conviction of Hartzel was affirmed as to all counts including the conspiracy count.

Statement of the Facts.

The facts out of which this prosecution arose are in substance as follows: The defendant Elmer Hartzel, prior to the entry of this country into its present war, composed certain articles of a controversial and political nature, which he mailed out to persons whose names and addresses appeared on a mailing list which he had prepared for that purpose. His mailing list was composed of headline personalities, prominent persons in the political, social and fraternal world, societies, organizations, etc., which he had largely gathered from newspapers, directories, almanacs, etc.

After Pearl Harbor Hartzel composed three articles of like nature which were mailed out in like manner, upon

which the first six counts of the indictment are based. Hartzel had his articles mimeographed at the shop of the defendant Soller, whose place of business was in the office of defendant Mecartney.

Hartzel had no connection with Soller except the business relationship. Soller had nothing to do with the composition or distribution of the articles. He printed them and received his pay. Soller sub-let space in a suite of rooms owned or controlled by Mecartney. Mecartney was, after verdict, held by the Trial Judge to be a by-stander and was granted a new trial, and discharged.

Life and Experiences of Elmer Hartzel.

To get the proper perspective of this case, we think it essential that we sketch for the Court the life and experiences of the defendant Elmer Hartzel; and this because the question of specific intent, or objective of the author must turn upon the character of the documents in question, the type of persons to whom mailed, and the viewpoint from which written. It is our thought that, when the whole record is looked at from this vantage point, there will be found in it a distinct negative of any intention to commit the crimes alleged against defendant Hartzel.

The defendant Elmer Hartzel was 51 years of age on September 9, 1943. He was born in New Castle, Pennsylvania. His blood lines are Scotch, Irish and German. His father and mother were each born on farms near New Castle, Hartzel's grandparents were born in Kingston, Pennsylvania. His people have been in this country since 1820, some one hundred twenty-odd years.

Hartzel started to school in his home town and he there received his grammar school education between 1897 and 1906, and took a preparatory school education at the Grove City Preparatory School at Grove City, Pennsylvania, from 1906 to 1909.

Between 1909 and the entry of our government in the World War in 1917, Hartzel followed several commercial or industrial occupations, including work for a wholesale butter and egg firm in Pittsburgh and as a switchman at Youngstown, Ohio.

Hartzel was among the first to seek enlistment in the World War in 1917. He could not make the Marines but succeeded in joining a unit being formed by the University of Pittsburgh for overseas service. He enter[illegible]d in the month of May, his number being an early one, Number 10,500. He received training at Allentown, Pennsylvania, and went overseas in September, 1917. He saw service in the University of Pittsburgh Base Hospital Number 27, doing X-ray work. While serving he was a candidate in the Artillery School, but before being accepted the war ended. He returned to the States in 1917 and was mustered out and honorably discharged at Camp Dix, New Jersey.

Between 1917 and 1923 Hartzel held various jobs, among them being employment in the Production Control Department of the Goodyear Tire and Rubber Company at Akron, Ohio, where he saw that the material flowed through the factory in an orderly manner and in the quantity wanted.

From the Goodyear Company employment at Akron, Hartzel entered service of the Akron City Health De-

partment where he worked for two years. While serving the City of Akron he obtained permission of the head of his department to enter the University of Akron, from which he graduated in 1923 with a degree of Bachelor of Science. In a retrenchment period, Hartzel, being the youngest member of the staff, was left off.

From Akron, Hartzel came to Chicago and entered the Chicago University, where he took undergraduate work and majored chiefly in economics and political economy. He studied in Chicago University until 1926.

After his course of study in the University of Chicago, Hartzel went to work for the National Bank of the Republic in Chicago, which was later merged with the City National Bank and Trust Company, as a financial statistician, a statistical man and investment adviser to the bank, where he remained until the end of 1927, when he went to New York to take further financial training. In New York he was employed for a period of six months by the Fitch Company, a publishing company, a financial analyst, and compilers of financial reports for The Analyst. After six months' service there he returned to Chicago to be married and has remained here since that occasion except as his employment took him out of Chicago. After his return to Chicago Hartzel wrote some articles for The Economist, a magazine published by the Chicago Journal of Commerce.

In September, 1928, Hartzel began employment with Kissel, Kennicut and Company on West Adams Street in Chicago as an investment analyst and remained there until that office was closed at the end of January, 1931, due to the financial crash of the period.

After the loss of employment in January, 1931, Hartzel could not obtain satisfactory employment and he stayed home and busied himself writing periodical articles which were published. Hartzel then obtained employment with the Department of Mines and Minerals of the State of Illinois at Springfield, but due to the current economy program the job was legislated out.

Hartzel then obtained employment with the Fernandi Company, investment brokers at Springfield, Illinois, and there worked until early in 1934 when that firm was dissolved and he returned to Chicago.

From 1934 to 1938 Hartzel worked in various jobs including one with the Cook County Bureau of Welfare doing statistical work at the Stockyard Station. He also worked in the library of the University of Chicago and did part time work in the Department of Philosophy of the University of Chicago and majored in philosophy and science. He also worked for Enyard-Van Camp, an investment company on La Salle Street, where he was assistant to one of the partners until it was dissolved.

In the interim Hartzel passed several federal and state examinations for civil service positions and took work in the Division of Unemployment Compensation of Illinois doing statistical and auditing work in the Merchandise Mart Building, where he remained until July 15. 1941.

In this period also, from 1934 to 1938, Hartzel did a lot of research work and wrote articles for magazines and journals, some of which were published, others not. Two articles from his pen appeared in the Accountant's Review published by the Association of University Accounts; an article for the University of Southern Cali-

fornia; one for Time in 1935; one for Harvard Business Review, and one for the University of Chicago published in its Journal of Business Economics.

Hartzel had passed some civil service examinations of the Federal Government for work as a financial economist and was on the assignment list. In 1941 he was called for emergency work in the auditing section of the United States Army Air Corps, in the civilian branch, a personnel of 5,000 employees. There he did auditing and was assigned to Detroit to work in the Packard Plant, where he worked until November, 1941; Hartzel then returned to Chicago to do personnel work in the Buick Motor Plant at Melrose Park, where his duty was to see that costs were kept according to required accounting procedures and remained there until February, 1942, when he was transferred to the Pullman Car Company at 103rd Street, South Chicago, where he continued in the same type of work, auditing books and verifying accuracy of records. He was in this employment when he was taken in custody on September 6, 1942.

How Hartzel Met Soller and Their Subsequent Relations.

In the spring of 1941 Hartzel was working in the Merchandise Mart in the Division of Unemployment Compensation of Illinois. He wanted to find a professional mimeographer adverse to war against Germany with whom he could contract (Tr. 57). The people who had been doing his mimeographing were not turning out satisfactory work and one of them had gone out of business. He wanted someone to do his work who would be near his place of employment. He had read in the paper about the German-American Alliance, which he supposed was

a kind of trade organization and which he thought would be opposed to Communism and might be opposed at that time to war against Germany (Tr. 80). We were not then at war. He went to the office of the German-American Alliance which was located on North Avenue within a couple of blocks of Halsted Street. He did not speak to any official of the organization, but merely spoke to two women who were working at that time in the office of the German-American Alliance and asked if they would refer him to some mimeographer that they knew. That was in May, 1941. They consulted a list in their office and referred him to the Reliable Letter and Addressing Service, 800 West North Avenue, which was operated by the defendant Elmer Soller (Tr. 58). Mr. Hartzel went to see Mr. Soller immediately and asked him if he would be in a position to do some work for him. Mr. Hartzel did not at that time have any article to be mimeographed.

Hartzel and Soller first met in the spring of 1941 at Soller's office and Hartzel stated to Soller that he had been recommended to him by the German-American National Alliance and inquired about his prices.

After Pearl Harbor Hartzel wrote and Soller mimeographed the three articles here in question from Hartzel's manuscript and Soller delivered the mimeographed articles to Hartzel for which he was paid his regular rate of charge.

Hartzel testified that he had no connection with Soller in the writing or distribution of his articles; that he had never conspired with Mecartney or Soller; that he was completely alone. He said, "I was completely alone and wanted to be" (Tr. 83, 84). Hartzel, in his statement said his wife gave him no assistance, and she so testified.

The Articles Set Out in the Indictment.

Three articles were set out in the indictment, upon the composition, printing and distribution of which the indictment is predicated. These three articles were composed, mimeographed and mailed out after Pearl Harbor. The article declared upon in Counts 1 and 2 entitled "The British: An Inferior Breed," and the article set up in Counts 3 and 4 entitled "The Jew Makes a Sacrifice: The Forthcoming Collapse of America," were written by Hartzel in the spring of 1942, mimeographed by Soller and mailed out by Hartzel in June, 1942. The article called "The Diseased Spinal Cord," portions of which are set out in Counts 5 and 6, was written by Hartzel in July, 1942, mimeographed by Soller and mailed out by Hartzel in August, 1942.

Hartzel, returning from Detroit in November, 1941, worked for a while in the Buick Plant at Melrose Park, a suburb of Chicago, and was then transferred in February, 1942, to the Pullman Company in South Chicago. In May, 1942, Hartzel had written the two articles which were entitled "The British, An Inferior Breed," and "The Jew Makes a Sacrifice: The Forthcoming Collapse of America," which Hartzel characterized as being short and intended to be mailed out together. They were mimeographed by Soller and Hartzel mailed them out within a few days after their receipt from Soller (Tr. 81). These articles, as before mentioned, were declared upon in Counts 1 and 2 and Counts 3 and 4 respectively.

The other article declared upon, portions of which are set out in Counts 5 and 6, was mimeographed by Soller for Hartzel, and is the one entitled "The Diseased Spinal

Cord." This mimeographed work was delivered by Soller to Hartzel at the corner of Michigan Avenue and Randolph Street outside of the Library Building, in Chicago. Soller received his pay for this work at the time of delivery. The explanation of this delivery at that point shows it to have been one of convenience only. Hartzel had moved to the far South Side in Chicago and the arrangement was made for delivery at that point of connection as Hartzel would use the Randolph Street Illinois Central Station and Soller could come down on the elevated from his office, which was considered a convenient method of delivery and connection (Tr. 81).

Articles Written Before Pearl Harbor.

The Court admitted in evidence, upon the theory that they were relevant to the issue of intent, seven pre-war articles composed by Hartzel, three of which were shown to have been mailed out prior to Pearl Harbor. These exhibits are as follows: Exhibit 60, "Revolution will come to America," composed in January, 1941 (Tr. 69); Exhibit 45, "Roosevelt's Illness," written early in 1940 (Tr. 63). The two other articles admitted were not shown to have been mailed out and no date of their composition was shown. These articles were Exhibit 46, "Roosevelt's Infantile Paralysis (Tr. 65) and Exhibit 47, "The Condition of Our Leader" (Tr. 68). These two last named exhibits, along with Exhibits 45 and 60, were found rolled up in a coffee can in Hartzel's trunk (Tr. 36). Exhibit 42 (Tr. 61) was found under the bathtub in Hartzel's home (Tr. 26).

Hartzel's Mailing List.

The defendant Hartzel had a mailing list of persons to whom he mailed out the several articles introduced here

in evidence. Hartzel commenced compiling this list of headline personalities in January, 1941, at the time he wrote the first article here in question. Hartzel said that he thought he saw war coming and wrote the article Revolution Will Come to America (Govt's Ex. 60, Tr. 69-75). He finally had a mailing list of 750 names, but at no time were more than 600 documents sent out (Tr. 79). This list consisted chiefly of prominent people, Congressmen, Representatives and Senators. The type of persons was prominent representative people. As time passed he began to eliminate a number of Representatives and Senators. Out of the World Almanac he got the names of patriotic societies such as Daughters of the Revolution, We the Mothers Mobilize, a list Hartzel considered patriotic organizations; it included fraternities, sororities and organizations of that type; the National Committee of America First, and of Frank J. Loesch, and bishops, and church representatives (Tr. 79-80). The names were compiled from various sources, names of prominent personages, such as associations and fraternities taken from the World Almanac; from a government publication containing a list of labor unions; persons engaged in the America First Committee whose names were in the headlines; American Legion, State and District Commanders whose names were taken from telephone directories at the Public Library, etc. (Tr. 59).

The envelopes that were addressed from Detroit were addressed by a public typist. The first article, Revolution Will Come to America, was mailed in envelopes addressed personally by Hartzel. In May, 1942, Hartzel purchased a typewriter and thereafter addressed his own envelopes; he also prepared the last three articles on this machine for use in mimeographing.

In the mailing out of these letters, Hartzel had no assistance (Tr. 60, 83, 84).

Persons to Whom the Articles Were Mailed.

The Government proved that the three articles declared upon had been received through the mail by certain persons and organizations, as follows:

1. The United States Infantry Association, publishers of the Infantry Journal, a service publication (Tr. 17).

2. Major General H. H. Arnold, Commanding General of the United States Army Air Force, War Department, Washington, D. C. (Tr. 18).

3. Joseph Huckins, Lt. Col. of the General Staff Corps, U. S. Army, San Antonio, Texas, testified to the receipt of articles in an envelope addressed to Colonel Hastings, Chief of the Military Intelligence Division (Tr. 18).

4. Franklin Bliss Snyder, President of Northwestern University (Tr. 18).

5. American Newspaper Publishers, 360 North Michigan Avenue, Chicago (Tr. 19).

6. Kiwanis International (Tr. 19).

7. Lions International (Tr. 19).

8. Air Line Pilots Association (Tr. 20).

9. American Legion Department of Illinois (Tr. 20).

The said documents or some of them were incidentally read or looked over by some persons who were connected with the above mentioned persons or organizations, and through whose hands they passed in the ordinary course

of their employment, and who were eligible for enlistment or draft or were already in the armed forces.

Court Refused to Instruct the Jury As to Specific Intent.

The indictment in this case sets out a special set of facts which are charged to have been accompanied with a special intent to accomplish a definite objective, to wit: the disruption of morale and the thwarting of enlistment.

It was contended below that the character of those allegations raised issues of *specific, actual, guilty* intent which the Government was bound to prove as laid; that it was not enough to say that a presumption could be indulged from the face of these documents and that from such documents defendants might be presumed to intend any natural and probable results of the language used; that in a criminal case a specific intent is not to be presumed from the wording of documents which on their face do not show a specific intent.

It was the contention of counsel for Hartzel during the trial that the charge in the indictment required proof of a specific intent in the mind of Hartzel by extraneous evidence that the articles should accomplish the objectives charged; and that he could not be convicted unless he did actually and specifically so intend; and at the conclusion of the evidence urged that the jury should be so definitely instructed.

So, before the Court commenced its charge to the jury, counsel for Hartzel asked the Court to instruct the jury in substance as follows:

> "That the things alleged in the indictment to have been done by the defendants in the matter of alleged interference with the enlistment and recruiting serv-

ice and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but the defendants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific, intention accompanied said acts" (Tr. 87).

But the Court did not charge as requested and in its main charge to the jury told them that they were at liberty to infer from all the circumstances in the case,—the language used, the probable result of the language used, and circumstances under which the documents were issued, intent to produce the results charged (Tr. 91).

After the charge was delivered, counsel for defendant called the attention of the Court to his request for an instruction as to specific intent as it applied to the case, but the Court refused to so charge the jury, allowed an exception and further charged the jury as follows (Tr. 98):

"It is necessary for the Government to prove that the defendants intended to interfere with the enlistment and recruiting services, and intended to cause insubordination; that is a necessary element of an

offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used" (Tr. 98-99).

In this we assert the Court erred and that our exception to the charge on the subject of intent should be here sustained.

Articles Written Before Pearl Harbor Erroneously Admitted in Evidence.

The Court admitted in evidence, upon the theory that they were relevant to the issue of intent, seven pre-war articles composed by Hartzel, three of which were shown to have been mailed out prior to Pearl Harbor. These exhibits are as follows: Exhibit 60, "Revolution will come to America," composed in January, 1941 (Tr. 56); Exhibit 45, "Roosevelt's Illness," written early in 1940 (Tr. 63). The two other articles admitted were not shown to have been mailed out and no date of their composition was shown. These articles were Exhibit 46, "Roosevelt's Infantile Paralysis" (Tr. 65), and Exhibit 47, "The Condition of Our Leader" (Tr. 68).

It is contended that the court erred in admitting in evidence the five articles written by Hartzel before Pearl Harbor over objection. They were irrelevant and incompetent under the issues.

Three of these five articles were written by Hartzel in the year 1941, namely "The Blood Sacrifice" (Tr. 81); "Roosevelt's Illness" (Tr. 63), and "Revolution Will

Come to America" (Tr. 69-75). These articles, together with two other articles, the date of composition of one of which is unknown, were admitted in evidence on the theory that they were relevant to the issue of intent; but, when they are read they show that if we had been at war when they were written and mailed they would not have been any violation of the sedition law. "The Blood Sacrifice" is an article devoted exclusively to criticism of the Jew. The article "Roosevelt's Illness", written in 1940 (Tr. 63), is a dissertation upon the well known illness of Mr. Roosevelt and interpreting that illness along psychological and political lines; "Roosevelt's Infantile Paralysis" is another psycho-political article; "The Condition of Our Leader" is a third article dealing with the psychology of the President as influenced by his physical condition; the article "Revolution Will Come to America" was composed in 1941. The court told the jury he had allowed them in evidence on the question of intent. The court said:

> "Some other documents have been admitted in evidence in this case that are not referred to in the indictment, the documents, I believe, that were issued before this war started, before December 8, 1941, and it was not criminal then to publish any such documents even though for any purpose. The statute that I read to you refers to activities when the nation is at war. Those are admitted in evidence, not as proof that the defendants were guilty of any acts or violation of the statute in publishing them at that time but simply on the question of whether you believe from the fact that they issued such documents and had expressed such opinions at the time when they issued these documents, the documents here, mentioned in the indictment, whether, when they issued those documents, they intended to interfere with enlistment and recruiting in the service or cause insubordination or disloyalty to the army."

It was also contended that prior to the war status these articles were entirely within the constitutional privilege and the assumption of a war status did not make these documents competent to prove a felonious intent allegedly entertained in composing and mailing out other writings after the war began; that if they were innocent compositions when written they were innocent when admitted and shed no guilty light upon subsequent events.

The Circuit Court of Appeals Invaded the Province of the Jury.

The trial court having refused to instruct the jury as to the question of specific intent (Tr. 87, 98), the affirmance of that judgment by the Circuit Court of Appeals decides that there was a specific intent, thus deciding a question withheld from the jury by the trial court and a question which the law has entrusted exclusively to the judgment of the jury.

ARGUMENT.

I.

The Government Failed to Show By Evidence the Successful Accomplishment of the Objectives Alleged in the First Six Counts of the Indictment and Failed to Show Any Attempt to Cause Insubordination, Etc., As Alleged in Counts 2, 4 and 6 of the Indictment, and Hence Failed to Prove a Crime Committed.

Section 33 of the Espionage Act, under which the defendants were charged in the first six counts of the indictment, was originally enacted in 1917 and as then enacted was known as Section 3 and as it then stood, and as it now stands, was and is as follows:

> "*Seditious or disloyal acts or words in time of war.* Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both. (June 15, 1917, c. 30, Title I, § 3, 40 Stat. 219; Mar. 3, 1921, c. 136, 41 Stat. 1359.)"

On May 16, 1918, Section 3 (now Section 33) was amended and by enlargement broadened to include a number of other types of conduct which the Congress punished with the same penalty as in the original section. But certain changes were made in Section 3, indicative of congressional intention, which should be held in grasp when studying the Act as it now stands.

After the World War had ended, the Congress, in 1921, repealed Section 3 as it then stood upon the statutes (41 Stat. 1359) and restored and revived Section 3 as it was originally enacted in 1917 (40 Stat. 219); and as enacted in 1917, Section 3 was in the identical words as now found in Section 33 upon which this indictment is based (Sec. 33 Title 50 U. S. C. A.) These changes have to do with the subject of criminal attempts, and are important in studying the text of the law itself as well as the decisions in World War I cases, some of which were for violations of the Act of 1918, and for offenses not now found in the present Section 33.

These changes in the Act are important for the reason that some of the leading cases were decided under the Act of June 15, 1917, and others under the Act of May 16, 1918.

Changes Made By the Act of May 16, 1918.

By the Act of May 16, 1918, that portion of Section 33 (then sec. 3) which now reads:

> "Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States,"

was amended to read as follows:

> "Whoever, when the United States is at war, shall willfully cause or attempt to cause, *incite or attempt to incite* insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States."

It will be noted that the words, "incite or attempt to incite" were added during the exigencies of that war

period and, in light of the experiences of that day, those words were dropped from the enactment in 1921.

The Congress also enlarged that portion of Section 33 which then, as Sec. 3, read:

> "Or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States"

by making it read as follows:

> "Or shall willfully obstruct *or attempt to obstruct* the recruiting or enlistment service of the United States to the injury of the service of the United States."

It will be further noted that the Congress, in amending this section in 1918, included the words, "Or attempt to obstruct," and in light of experience of the day, struck out that phrase when it revived and restored Section 33 as it was originally enacted.

For convenience we break down Section 33 so far as is here material into its several elements by paragraphing it so as to get them readily into the eye. As broken down it is as follows:

> *Par. 33. Seditious or Disloyal Acts or Words in Time of War.* (1) * * * ; and
>
> (2) Whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States; or,
>
> (3) Shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States,
>
> shall be punished by a fine of not more than $10,000, or imprisonment for not more than twenty years, or both.

Thus we visualize the distinctive crimes created by Section 33; the first refers to false reports; the second, causing insubordination and mutiny in the armed forces or attempting to do so; and the third obstructing the recruiting and enlistment service. It is obvious that those three crimes are distinctive and separate offenses.

The Scope of the Section.

Section 33 was no doubt intended to give comprehensive protection to the military structure and war effort during war periods. In brief, the war effort is protected against propaganda, destruction of morale, and interference with increase of personnel.

Only the second and third designated crimes are here involved.

The second field embraces the spirit and morale of the military or naval forces; and this, of course, must refer to the inducted personnel of the forces as there can be no mutiny or insubordination, disloyalty or refusal of duty until the oath is taken and the party has passed out of civilian status and into the discipline of military service. The oath is the end of civilian status and the commencement of that of a soldier, (*In re Grimley*, 137 U. S. 140.)

The third field covers civilians eligible for war service and from which field the new units of the armed forces are selected or recruited, but who have not been inducted into the service.

Following the third provision of the statute is the provision "to the injury of the service of the United States,"

which from its context appears to refer to the second and third crimes created by the section and upon its face means that unless the war service is injured there is no crime; that there is no crime except in accomplishment of the objective, except the provision covering attempts to cause insubordination, etc.

We think the addition of the words "attempt to obstruct," to the section in the Act of May 16, 1918, and its omission by the revival of the section on March 3, 1921, so as to return it to the exact wording in which it was originally phrased, has a distinct significance which should be called to attention. It emphasizes the idea that these provisions cover separate fields of objectives and have no overlapping areas; that the mailing of the documents must have been shown by proof to have in fact created an obstruction to recruiting and enlistment; that as to causing insubordination, disloyalty, mutiny or refusal of duty, it must have been shown as an accomplished fact, if it were a fact; or shown as an attempt, if in fact, there were an effort made which failed to merge into accomplishment.

And we think also that the failure of Congress to originally use the word "attempt" in this portion of the section, putting it in at a later period of time, and leaving it out in a still later amendment, indicative of legislative intent that the section should be construed strictly as written. Where the Congress puts a heavy penalty upon any one who "shall wilfully obstruct the recruiting or enlistment service of the United States" it seems that it was intended that that penalty should follow upon the accomplishment of that objective and upon *accomplishment* only. "Shall wilfully obstruct" means that an indictment will lie when the defendant shall have wilfully obstructed, that is when he shall have accomplished the objective, in the past perfect tense.

Certainly it cannot be a proper construction of the Act to say that defendants created a situation out of which such an obstruction to recruiting or enlistment *might* flow. Such a construction flies in the face of the words of the Act and obvious legislative intent. Presumptive injury is not penalized by the statute, nor even remote injury. Only accomplished wilful injury is punished.

This idea is emphasized when we look at the other clause which says that any one who shall cause *or attempt to cause* insubordination, disloyalty, mutiny, or refusal of duty, shall be fined not over $10,000 nor imprisoned more than twenty years or both. Here there is an actual differentiation between an objective accomplished and an objective attempted. For each the Congress has provided the same penalty. Fine and imprisonment for an unsuccessful effort; fine and imprisonment if the objective is attained and insubordination, disloyalty, mutiny, or refusal of duty has been actually caused in the service. A defendant is punishable only when he shall have caused,—past perfect tense,—or attempted. Certainly it cannot logically be said that Congress could have meant that a person should be visited with those penalties if he merely created a situation out of which insubordination, disloyalty, mutiny, or refusal of duty could *possibly* grow. That is not the language of the law and it is not the plainly expressed intent of the Congress as appears in this law. Insubordination, disloyalty, mutiny and refusal of duty might spring from many conditions. It is only when wilfully caused or a wilful attempt is made to cause them that the law applies a penalty, that is, where a substantial injury to the service has resulted or was attempted.

The Government Did Not Prove the Accomplishment of Any Crime.

Now the Government made no effort to prove that any injury to the United States followed upon the mailing of the articles in question; and there is an entire absence of proof of any facts that would tend to show that under Counts 1, 3 and 5 defendants did, as an accomplished fact, obstruct the recruiting and enlistment service of the United States in any manner or by any means.

Nor did the Government under Counts 2, 4 and 6, prove by any facts that the defendants caused any insubordination, disloyalty; mutiny or refusal of duty by any person in the armed forces: There is an entire absence of any evidence or proof of any result or consequence of the mailing of the documents in question. So far as the service was concerned, it was not shown to have been affected in the least.

No reaction by any person or group to the articles was shown by the Government except that they were sent to the Federal Bureau of Investigation.

The Case Hinges Upon "Attempt".

Now the foregoing demonstrations show that the Government did not prove the charges in the first six counts of the indictment unless it be said that there was proof under Counts 2, 4 and 6 of an *attempt* to cause insubordination, disloyalty, mutiny or refusal of duty. This leads to a study of the subject of criminal attempts.

Now the language of the statute is:

> "Whoever, when the United States is at war, shall *wilfully* cause or *attempt to cause* insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States * * * shall be punished by a fine of not more than $10,000 or imprisoned for not more than twenty years, or both."

The question here is what constitutes a *wilful attempt* to cause the indicated reactions of the forces.

Wilfulness is said to be a stubborn purpose to do a certain thing; a determination to see a thing through to the bitter end. It is affirmative action, definitely not negative.

A criminal attempt is an affirmative moving action accompanied by an intention, actual and specific, to accomplish a given purpose, do a certain thing, or reach a certain objective, and it must have *failed.* The intention must be *specific;* it cannot proceed from a *negative* mind; it has nothing to do with natural and probable consequences; the objective must be *fully visioned* and the accused must make an *effort;* he must do some overt act to carry out his intent; he must try, and *wilfully try,* to accomplish it, and fail in the attempt. If the attempt is successful, it merges into the accomplished crime and is no longer an attempt, but is then an accomplishment, a thing done.

Now there was no proof made by the Government that the defendant had in mind or visioned as an objective the disorganization of the forces of the United States when the articles were composed, printed or mailed. And there being an absence of any such proof in the evidence, no attempt to cause was proven and obviously, without proof of such an intent in mind, and a wilful purpose with it, there could be no attempt.

There was no effort to reach the armed forces or the personnel thereof. The effort was toward entirely different groups or types of persons. The method of selection of the names of persons on the mailing list negatives any intention to make any effort to reach and influence the armed forces.

The proof did not tend to show that insubordination, disloyalty, mutiny, refusal of duty in the military and naval forces of the United States was the objective of the articles in question. There never was, either before or after Pearl Harbor, any effort to reach the personnel of the armed forces through the mailing list of headline personalities.

The tendency of the evidence is to the contrary.

Again there is doubt whether mailing such communications under seal to persons of intelligence imports any intention in mind of the author that the expressions of opinions or ideas in the document shall carry on and on until they shall engulf and create disruption and breakdown of the morale of the armed forces: Obviously no such indirect method was contemplated. Any such thought must rest upon presumption and specific intent is not provable by presumption.

The Government failed to prove either an attempt or an accomplished objective and hence failed to prove a crime.

II.

Where the Article Charged to Be Seditious Shows No Specific Intent Upon Its Face Its Publication Alone Does Not Violate the Act.

It is our contention that where nothing appears upon the face of the articles showing a specific intent to com-

mit the crimes charged and no evidence is introduced by the Government to show the criminal and specific intent, inherent in the crime charged, such crime is not proven; and that the presumption of innocence is not overcome, and reasonable doubt still exists; and that the true rule is that where on the face of the circulated document no specific intent appears to commit the very crime charged and no proof is made otherwise by the Government to give the document such an intent, then no crime is proven, as the document is the means charged, and, when proven, it supplies no evidence of intent.

In the leading cases which have reached this court, the specific intent appeared in the language of the written documents, which together with proof of the mode of distribution and the persons among whom distributed was held to support convictions.

We analyze those cases for purposes of illustration.

In the first three cases reaching the high Court, all argued in January 1919, there was no dissenting opinion. All three of these cases, *Schenck* v. *U. S.*, 249 U. S. 47, *Frohwerk* v. *U. S.*, 249 U. S. 204, and *Debs* v. *U. S.*, 249 U. S. 211, were affirmed and Mr. Justice Holmes wrote the opinions of the Court in all of them, and in the *Schenck* case stated a general rule by which to decide such cases which we hereinafter quote. First we will analyze those three cases.

In the *Schenck* case (arising under the Act of June 15, 1917), the medium used for distribution of statements was leaflets in which there was specific reference to the draft, stating, among impassioned utterances, that: "A conscript is little better than a convict", and that conscrip-

tion was "despotism in its worst form"; and the class of persons among whom the leaflets were distributed was men who had passed exemption boards, drafted men. In the *Schenck* case the Court laid down the general rule for the decision of such sedition cases, as follows:

> "The question in every case is whether the words used were used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that congress has a right to prevent. It is a question of proximity and degree." (p. 52).

In the *Frohwerk* case the medium of distribution was the Missouri Staats Zeitung, a newspaper published in a metropolitan center, and the articles therein, on which the charges were based, bore upon their face specific reference to the draft service and resistance to it. There was no bill of exceptions (*Ex parte Frohwerk*, 248 U. S. 540), to show excusing circumstances, so the case was decided upon the nature of the medium used, the persons possible to be reached by that medium, and the character of the articles published. The court visioned possible defenses (p. 208), but as they were not in the record the case was affirmed with the hesitating statement, and apparently against mental inclination, that:

> "We are driven to the conclusion that the record shows no ground upon which the case can be reversed." (p. 210).

In the *Debs* case the medium of communication was a public speech to a concourse of people in which Debs openly advocated resistance to the draft and praised and sympathized with others who had been convicted and imprisoned because of resistance to the draft. Again, Debs addressed the jury in his own behalf, and reiterated his public statements in challenging terms, to the distress of

his counsel (p. 215). So, the medium of communication being ample, and the statements openly obnoxious and defiant, the Supreme Court affirmed the judgment.

All three of the cases, *Frohwerk, Schenck* and *Debs*, were affirmed,—the *Frohwerk* case, because there the articles referred to the draft in a derogatory manner and there was no bill of exceptions; the *Debs* case because Debs stood before his jury and defiantly iterated, reiterated, and affirmed his seditious utterances leaving the Court helpless to aid him; and the *Schenck* case because the documents circulated called conscription a monstrous wrong and advised the persons circularized,—men who had passed exemption boards, to assert their rights and not to submit to intimidation.

But out of these cases is to be drawn these essentials,—that the document must be of such nature that it is calculated to create the injury prohibited; the means of circulation must be ample to reach the class of service men or draftees, and the persons reached must be the type on whom the statements would react "to the injury of the service of the United States", for it is clear the law is not aimed at isolated cases, but at causing insubordination, etc., in the "*forces*", and obstruction to the "recruiting or enlistment *service*".

And the intent must be proven directly or by circumstances,—not presumptions.

The Cases in Which Dissenting Opinions Were Filed.

After the unanimous opinions in the three cases, *Schenck, Frohwerk* and *Debs*, were filed, there arose three other cases, *Abrams* v. *U. S.*, 250 U. S. 616, *Schaefer* v.

U. S., 251 U. S. 466, and *Pierce* v. *U. S.*, 252 U. S. 239, in all of which Justices Brandeis and Holmes filed dissenting opinions. A study of the majority and minority opinions in these cases furnishes a true rule for decision of this case which is, as we deduce it, that specific intent is sufficiently proven if that intent appears upon the face of the document by direct references to the draft or enlistment service in a derogatory manner sufficient to cause clear and present danger that the evil Congress sought to avoid will arise. Otherwise not.

In the case of *Abrams* v. *U. S.*, 250 U. S. 616, a conspiracy case, in which the indictment was predicated solely upon the leaflets (p. 624), the Court in its majority opinion stated that:

> "Men must be held to have intended and to be accountable for, the effects which their acts were likely to produce." (p. 621).

In conspiracy the *effect of the acts* is not the basis of decisions as we all know, so the language used in the opinion must be looked at in its setting, and not taken generally, as a rule of decision. The majority opinion there held:

> "• • • • the plain purpose of their propaganda was to excite at the supreme crisis of the war, disaffection, sedition, riots and, as they hoped, revolution, in this country for the purpose of embarrassing, and if possible, defeating the military plans of the Government in Europe" (p. 623).

And the Court said:

> "Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established" (p. 618).

The Dissent of Justice Holmes.

Now the dissent of Justice Holmes, joined in by Justice Brandeis, was predicated essentially, at least largely upon the ground that no *specific intent* had been shown to have been in the minds of the accused to accomplish the *objectives* charged; whereas the majority had held that upon the face of the documents the objective was clear; and that was what the quote from the majority opinion referred to when it said men were to be held to the consequences their acts might produce.

Now in the *Abrams* case Justice Holmes points to the absence of proof of specific intent. He said:

> "But to make the conduct criminal the statute requires that it should be 'with intent by such curtailment to cripple or hinder the United States in the prosecution of the war'. It seems to me no such intent is proved" (p. 626).

The Justice then went on to expound the doctrine of *specific intent*. He said:

> "I am aware, of course, that the word intent as vaguely used in ordinary legal discussion means no more than knowledge, at the time of the act, that the consequences, said to be intended, will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law, might be hanged, if, at the time of his act, he knew facts from which common experience showed that the consequences would follow whether he, individually, could foresee them or not.
>
> But when the words are used exactly, a deed is not done with intent to produce a consequence, unless, that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the conse-

quence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind" (pp. 626-627). * * * "Congress certainly cannot forbid all effort to change the mind of the country. Nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so" (p. 628).

Now the majority opinion of the Supreme Court in the *Abrams* case did *not say* that the doctrine of specific intent did not apply to such cases, but, what it necessarily *held* was that the rule that specific intent must be shown was *satisfied* by the expressions on the face of the papers, quoted in the opinion, such as:

"Workers of the World, Awake! Rise. Put down your enemy and mine. * * * Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the Government know that not only the Russian Worker fights for freedom but also here in America lives the spirit of Revolution. * * * Workers up to fight." (pp. 620-622.)

While the minority opinion to the contrary was that a specific intent did not sufficiently appear in the language so as to accomplish the particular criminal objectives charged in the indictment.

Thus we see that the dispute in the *Abrams* case was over the **application of the rule** as to specific intent and not over the rule itself. The rule itself was conceded.

In the case of *Schaefer* v. *U. S.*, 251 U. S. 466, there was a dissenting opinion by Justice Brandeis joined in by

Justice Holmes. The majority opinion held that the articles published in the Philadelphia Tageblatt, there in question, upon their face showed the intent charged in the indictment. Such expressions in headlines as "The Failure of Recruiting" and statements that an "advertising campaign was worked at high pressure" and that "all sorts of means were tried to stir up patriotism", but that "the recruits did not materialize" (p. 480). But the dissenting Justices did not see in the documents the "clear and present danger" rule announced in the *Schenck* case.

In *Pierce* v. *U. S.*, 252 U. S. 239, there was also a dissenting opinion by Justice Brandeis concurred in by Justice Holmes. The case involved the distribution of a pamphlet entitled "The Price We Pay". In Baltimore, District Judge Rose had ruled its circulation was not illegal and discharged the accused by a directed verdict. The distribution of some 5000 copies was then made by persons in Albany among whom was Pierce. It was held by the majority opinion:

> "It was shown without dispute that the defendants distributed the pamphlet—The Price We Pay—with full understanding of its contents; and this of itself furnished a ground for attributing to them an intent to bring about, and for finding that they attempted to bring about, any and all such consequences as reasonably might be anticipated from its distribution" (p. 249).

Thus the majority opinion is founded upon the idea that the specific intent appeared upon the face of the document itself (p. 249), which openly denounced the drafting and recruiting of sons when they grew up to soldier size, and age after age, mounting up and up (pp. 245-246). That this was so is emphasized by the statement in the minority opinion that "the leaflet is unaffected by extraneous

evidence which might give to words used therein special meaning or effect'' (p. 256).

The dissenting opinion further said concerning the charge that the defendants conspired and attempted wilfully to ''cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces'' that:

> ''No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been said in respect to the third count as to the total lack of evidence of evil intent is equally applicable here.
>
> ''A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces'' (p. 273).

The Lesson to Be Learned From the Conflict of Opinion in Sedition Cases.

Out of the several Supreme Court cases cited on hearing counsel it is thought this much is obvious: That the majority of the Supreme Court were of opinion that where, upon the face of the writings distributed, there appeared specific references to the draft and recruiting, advising resistance, etc., that was evidence of specific intent; which, instead of militating against the proposition and opinion we have here advanced really, and in fact, sustains our point of law made here that where nothing appears upon the face of the paper pointing to the crime charged and no evidence is introduced to furnish the criminal and specific intent, inherent in the crime charged, the crime is not proven; the presumption of innocence is not overcome, the reasonable doubt still exists.

We respectfully suggest that the true rule is that where on the face of the circulated documents no specific intent appears to commit the very crime charged and no proof is made by the Government to give the document such an intent, then no crime is proven, as the document is the means charged, and it supplies no evidence of intent.

The trial court should have directed the jury to find a verdict for defendant for failure to prove the crime as alleged.

III.

The Government Failed to Prove the Issues It Created in Its Indictment and Defendant's Right to Freedom of Speech Under the Constitution Was Invaded By the Conviction.

We commence this section with the suggestion that statements used in writings are protected by the freedom of speech provision of our Constitution up to the point where tolerance must end and self-preservation must begin; where government must assert its paramount right to its life and existence; to a point where, as has been said, a citizen creates a danger clear, present and imminent.

If, upon their face, such writings as are here in question are equivocal and indecisive, the presumption of innocence and reasonable doubt safeguard the defendant until the Government shows by extraneous proof that acts of the defendant, taken in connection with the documents, have created a clear and present danger.

There is no presumption that a defendant has gone too far in exercising his basic right to freedom of expression.

The Government must prove its allegation, when it so alleges, that he has exceeded his constitutional allowance of liberty and prove that fact beyond reasonable doubt.

The Charges Should Be Proven As Alleged.

Where writings are not clearly and unmistakably seditious, proof *dehors* the instrument is required to support the charge that they are and that the writings were published and circulated to effectuate the seditious intent alleged; otherwise there would be no constitutionally protected right to expression; otherwise it would cast the burden upon the citizen to prove he was within the constitutional protection instead of upon the Government to prove he had gone beyond his constitutional guaranty.

The documents declared upon, do not, upon their face, contain any reference to the recruiting, enlistment or draft whatever. There is only expression of racial criticism, political opinions, expressions concerning governmental policies, and derogatory remarks but not one word advocating resistance to draft, discouraging enlistment or recruiting, counseling insubordination, disloyalty, mutiny or refusal of duty.

There is not upon the face of these documents any indication of an affirmative effort or intention to obstruct the war effort as such.

Nor is there in the article any exhortation to eligible persons; nor pleas to induce those already inducted into the service to mutiny, or refuse to do military duty, or to become insubordinate, or disloyal to the Government. No such thing was proven by the Government nor did

the Government attempt even to prove an attempt to do so.

The documents, not furnishing, in and of themselves, positive and conclusive evidence of such obstruction of recruiting and enlistment service, or attempt to destroy morale, proof of such objectives must be found, if at all, in the record otherwise made by the Government.

But the Government proved only that the articles were mailed to representative persons in the public headlines and to societies, unions, clubs, papers and officials of Congress, etc., and that such people and organizations were the elements or stratum of society into which the documents were sent.

There was no proof made that the articles were distributed among the armed forces or among that group of youthful persons especially eligible for the selective service or persons eligible to enlist in the service, with animus and intent to stall the recruiting service or break down the morale of the armed forces.

Hartzel's Mailing List Was Headline Personalities.

The statement taken from Hartzel by F.B.I. Agent Carroll (Tr. 75-81) shows in what manner Hartzel made up his mailing list and the types of personages to whom his writings were sent. He obtained his names from various sources. From World Almanac he obtained the names of various prominent personages, associations and fraternities; from a Government list, certain labor unions; from newspapers, the names of persons engaged in America First Committee activities; from telephone directories, the names of State and District Commanders of the

American Legion; and he mailed to such organizations as Daughters of the American Revolution and We the Mothers Mobilize (Tr. 79). His mailing list of 750 was made up mostly of prominent people and a large portion were sent to congressmen, senators and other representatives. The type reached and intended to be reached was prominent, representative people (Tr. 126). The proof on this was affirmative and no other indication is in the record.

Defendant did not look for the roll calls of the forces for his names.

In making its proof, the Government proved that Hartzel had mailed his articles to the United States Infantry Association, publishers of the "Infantry Journal," the Major General of the United States Army, Chief of the Military Intelligence Division, the President of the Northwestern University, the American Newspaper Publishers, Kiwanis International, Lions International, Air Line Pilots Association, American Legion Department of Illinois (Tr. 19-22). These are, of course, a select list and the army officers or employees were brought to court to testify to receipt of the documents. But it all adds up to a list of top ranking personages, heads of movements, and political and social organizations, which disproves the allegation that the articles were directed toward obstruction of the war effort by specifically circularizing those persons inducted into the armed forces and persons eligible therefor.

There was no proof of a specific circulation of the articles among eligible draftees, or volunteers, or those already inducted, nor that such was intended; so that the record speaks that there was no specific or actual

intent to obstruct recruiting or enlistment or destroy morale in the manner or method of distribution of the articles.

The fact that after reading the articles, some one may have incidentally turned away from volunteering, or a member of the armed forces have gone A.W.O.L., is not the test. Such action might result from the most innocent statements of any one or some special urge; but that is not the test; the law is only violated by wilfully obstructing the recruiting or enlistment service, or wilfully causing or attempting to cause the breakdown of morale, of which the Government made no proof. Injury to the *service* of the United States is the language of the law.

We think the words of Mr. Justice Holmes, found in the *Abrams* case, may well be noted here and could as well have been written concerning the documents now before the court in this case:

> "Nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." (p. 628)

And may we add that the writer of the opinion in this case in the Circuit Court of Appeals expresses the same thought:

> "It may be, we hope it is a fact, that there are few if any persons in this country so naive as to place any credence in the articles complained of, and it may be no great harm resulted from their publication." (Tr. 124)

Nor is there in the articles any exhortation to eligible persons; nor pleas to induce those already inducted into

the service to mutiny, or refuse to do military duty, or to become insubordinate, or disloyal to the Government. No such thing was proven by the Government nor did the Government attempt to prove an attempt on the part of defendant so to do.

The result is that the defendant was convicted for having written and mailed the articles; for the *act* not the *intent* with which the act was done; for no intent, general or specific, to do injury to the military or war service of the United States in the manner charged was shown to have been in Hartzel's mind when he penned the articles and mailed them out. Wilfulness and the evil intentions alleged, were not proven, and without them no crime was proven.

Without proof of a wilful purpose,—which means an affirmative, stubborn intent and purpose existing in the mind to cause insubordination, disloyalty, mutiny or refusal of duty, or to wilfully obstruct the recruiting or enlistment service,—the law cannot be said to have been violated. The Government did not show such a condition of mind. Hence it showed no crime.

A General Intent Is Not Sufficient. Specific Intent Is Essential.

If the Government here contends, as it has heretofore, that a presumed intent, *i.e.*, that a person is presumed and bound to intend natural and probable consequences of his acts, is all that is necessary to prove the intent here alleged,—a wilful felonious purpose, then we reply that the Government proved no actual consequences and the argument is sophistry. Effect must be shown before a cause can be said to exist or become material. If there

are no consequences, no effect, no cause can exist, all of which is axiomatic. Cause and effect exist together, not separately.

There can be no question but that the very essence of a *criminal attempt* is an existing *specific intent*. (16 Corpus Juris 113.) To attempt is to specifically intend, and try.

The allegation that insubordination, etc., was wilfully caused and recruiting, etc., wilfully obstructed, includes a specific intent; and the allegation that the articles were prepared and mailed with a certain named intent, purpose and objective is not satisfied by *presumptive proof*, for it alleges an affirmative active thing,—a specific intent.

A defendant's constitutional right to freedom of speech is not to be taken away by some technical evidentiary presumption relied upon in lieu of proof.

Therefore we conclude that the Government proved only that Hartzel wrote the articles and that they were sent to certain persons, and no more; and that the Government therefore failed to show facts sufficient to take the case into the field of apparent danger clear and imminent, and which only would overcome the right of defendant to that quantum of freedom of speech and press guaranteed by the First Amendment to our Constitution.

For the error in refusing to direct the jury to find defendant not guilty, the judgment should be reversed.

IV.

The Articles Set Out in the Indictment Contain No Reference to Insubordination, Etc., Nor to Enlistment Nor Selective Service and the Printing and Distribution Was No Violation of Section 33.

An examination of the three articles set out in the indictment reveals that there is not a word of reference to the selective service, enlistment, or volunteers or soldiers, sailors, marines, air corps or war personnel. There can be found therein no exhortation to any one in the service to get out or refuse duty or become disloyal or insubordinate or mutinous, or to stay out.

The whole scope of the articles is political or philosophical or critical of elements of society or government in action. There is not a thought of interference with the war effort. If mailed promiscuously they would not create the conditions charged as criminal in the several counts.

A man under our system of government does not lose his citizenship when he accepts the status of soldier. He is still the normal human that he was. Just because he is in the armed forces is no sign that he does not have the normal resistance that he had before entry therein. These articles would not injure any military man. Far from being influenced by the articles in question, all of the persons who testified here sent them to the F. B. I.

The article, "The Jew Makes a Sacrifice," is clearly an anti-Semitic article and has no reference to selective or enlistment service or soldier morale. No matter where sent or to whom they could not influence disloyalty or mutiny in a normal mind or have any other such influ-

ence as is alleged. And the same is true of the article, "The British: An Inferior Breed."

The same may be said about the facts stated concerning the President and the opinions stated, and political discussions, found in the article "The Diseased Spinal Cord"; they do not bear upon or typify the evils Congress sought to reach in Section 33; not remote political matters but direct and positive acts of a wilful nature interfering with the war man power is punished.

Mere talk about the President or other high official has not been made criminal by Congress. In *U. S.* v. *Hall*, 248 Fed. 150, 153, the court said in discussing language far more caustic than we have here:

> "Congress has not denounced as crimes any mere disloyal utterances nor any slander of the President or any other officer of the United States."

To the hands of whomsoever these articles might come there was in them no thought of solicitation, or exhortation to disloyalty or interference with the gathering in by the Government of her man power.

It Was War,—War in the Abstract That Hartzel Combatted.

In studying this view of Hartzel's activities, sight should not be lost of his historical background and his own war record. Hartzel comes from native born parents and grandparents out of the Pennsylvania melting pot of sturdy races, Scotch, Irish and German; in what proportions he did not say, but as his name comes in the male line from German ancestry, it is apparent that a mother and grandmother were Scotch and Irish. His

people have been here since 1820. Hartzel was among the first volunteers in the World War. Failing to get in the Marines, he was taken in the Pittsburgh University Hospital organization, went overseas in September, 1917, where he remained engaged in X-ray service till 1919, when he returned to the States and was honorably discharged. He had been a candidate for a commission in an artillery school overseas but peace broke before his acceptance.

Hartzel saw the distressing by-product of war as the wounded passed through the hospital incapacitated, many for life. He experienced the effects of the demobilization of an army on post-war life and industry. He educated himself to ride the wave of success in statistical work in production and economy. The depression engulfed us. Hartzel saw one enterprise after another, in which he was working, collapse in the period of depression. He took up civil service to obtain a livelihood. Statistically and research minded, he wrote articles widely published. He saw the recession ride in upon us as a backwash of the depression or its attempted cure.

He felt its surge against his efforts to produce the necessaries of life, the keen competition of others that seemed crowding him out of the center of plenty to the edge of the circle of scarcity. From bitter experiences he began drawing social and political deductions and putting them on paper. Hartzel said that he thought he saw war coming in January, 1941, when he wrote Revolution Will Come to America, and commenced preparation of his mailing list (Tr. 79). The rest of the story we have discussed.

But it all adds up to make the thought that what Hartzel was combatting was another era of war, physical suf-

fering, inflation, depression, recession, human misery, the vicious cycle out of which human experience has never taught us the way of escape, for each generation is a law unto itself and insists upon the right to make its own mistakes, if mistakes they may be considered in the long view history.

It was war, war in the abstract, that Hartzel talked against, not the prosecution of the specific war in which we are engaged. And though we may not agree with his philosophy we must protect his right to express it.

Hartzel Stated His Motive.

On the witness stand in his own defense after specifically denying any intention to commit the crimes charged, he was asked (Tr. 82-83):

> "Mr. Rankin: Will you state to the court and jury what was your intention then in writing and distributing those articles?
>
> Mr. Hartzel: I always regard my work as from a statistical standpoint and business, and also taking the war aspect, I thought there was a trend toward Communism, and I thought it was quite a dangerous position because of warfare between the white races, it would be the cause of war between the white and yellow races, and rather than have it beat into us, we might as well face the facts and know what we were facing, a certain group of Communists discussing methods, their viewpoints, I wanted to help minimize that so we could again have public standpoint established in this country. I am not in here because I am disloyal, and I have no prison record, but because the Communistic question is beginning to get in here and will cause the disappearance of this court, and the absorption of the executive branches otherwise of the government, the disappearance of the things that I was trying to work toward."

And so we say the Government wholly failed to prove commission of any offense or attempt or any specific intent or even general intent to commit the offenses charged, while on the other hand defendant made proof that there never was in his mind any idea of disloyalty to his government or intent to interfere with its manpower or potential personnel.

In our judgment the Government failed to make proof against Hartzel of the crime charged.

V.

The Articles Written Before Pearl Harbor Were Erroneously Received in Evidence.

It is contended that the court erred in admitting in evidence the five articles written by Hartzel before Pearl Harbor over objection. They were irrelevant and incompetent and naturally prejudicial.

Three of these five articles were written by Hartzel in the year 1941, namely "The Blood Sacrifice" (Tr. 61); "Roosevelt's Illness" (Tr. 63), and "Revolution Will Come to America" (Tr. 69-75). These articles, together with two other articles found in Hartzel's trunk, the date of composition of one of which is unknown, were admitted in evidence on the theory that they were relevant to the issue of intent; but, when they are read they show that if we had been at war when they were written and mailed they would not have been any violation of the sedition law. "The Blood Sacrifice" is an article devoted exclusively to racial criticism. The article "Roosevelt's Illness", written in 1940 (Tr. 33), is a dissertation upon the well known illness of Mr. Roosevelt and interpreting that illness along psychological and political lines; "Roosevelt's

Infantile Paralysis" is another psycho-political article; "The Condition of Our Leader" is a third article dealing with the psychology of the President as influenced by his physical condition; the article "Revolution Will Come to America" was composed in 1941, and Hartzel said of this article:

> "I composed this in approximately January, 1941. This article was composed of two parts, the first part dealing with the tendency of this country toward war and hinting at the potential results thereof; the second part dealing with what he considered to be pertinent quotations from prominent personages." (Tr. 56-57).

When these documents are looked at from the viewpoint of our constitutional privilege, it is seen they are clearly within the limit of the right of free speech. War would not make them seditious and they were not relevant and not being relevant carried within them the virus of prejudice to the jurors' minds.

Prior to the war status these articles were entirely within the constitutional privilege and the assumption of a war status did not make these documents relevant to prove a felonious intent allegedly entertained in composing and mailing out other writings after the war began. If they were innocent compositions when written they were innocent when admitted and shed no guilty light upon subsequent events. True, the court told the jury he had allowed them in evidence on the question of intent. The court said:

> "There is one other thing that you must consider. Now another thing which I will refer to just now, some other documents have been admitted in evidence in this case that are not referred to in the indictment, the documents, I believe, that were issued before this war started, before December 8, 1941, and

it was not criminal then to publish any such documents even though for any purpose. The statute that I read to you refers to activities when the nation is at war. Those are admitted in evidence, not as proof that the defendants were guilty of any acts or violation of the statute in publishing them at that time but simply on the question of whether you believe from the fact that they issued such documents and had expressed such opinions at the time when they issued these documents, the documents here, mentioned in the indictment, whether, when they issued those documents, they intended to interfere with enlistment and recruiting in the service or cause insubordination or disloyalty to the army."

Notwithstanding the caution of this instruction we think the damage was already done and the impressions formed could not be eradicated from the jurors' minds.

VI.

It Was Error to Instruct the Jury That the Defendant Was Presumed to Intend the Natural and Probable Consequences of His Acts and Language in a Case Involving a Specific Intent.

It is contended that the court erred in instructing the jury as to the proof of the intent with which the documents were prepared and disseminated through Hartzel's mailing list.

It was the contention of counsel for Hartzel during the trial that the charge in the indictment required proof of a specific intent in the mind of Hartzel that the articles should accomplish the objectives charged; and that he could not be convicted unless he did actually and specifically so intend; and at the conclusion of the evidence urged that the jury should be so definitely instructed.

So, before the Court commenced its charge to the jury, counsel for Hartzel asked the Court to instruct the jury in substance as follows:

> "That the things alleged in the indictment to have been done by the defendants in the matter of alleged interference with the enlistment and recruiting service and alleged intention to cause insubordination, etc., were not charged against them as being in themselves criminal, but the defendants were charged with having done those acts with a criminal intent in mind; that the intent charged in all the counts of the indictment is what is known in law as a specific intent which means that the defendant or defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some one or more of them did the acts charged in the indictment, still the jury may not find the defendants or any or either of them guilty as charged unless the jury also find that the acts were done with an actual, specific intention in mind to commit the offenses charged in the indictment; and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts or of the language used unless the jury also find that such actual, specific intention accompanied said acts" (Tr. 133-134).

But the Court did not charge as requested and in its main charge to the jury told them that they were at liberty to infer from all the circumstances in the case,—the language used, the probable result of the language used, and circumstances under which the documents were issued, intent to produce the results charged (Tr. 138).

After the charge was delivered, counsel for defendant called the attention of the Court to his request for an

instruction as to specific intent as it applied to the case, but the Court refused to so charge the jury, allowed an exception and further charged the jury as follows (Tr. 145):

> "It is necessary for the Government to prove that the defendants intended to interfere with the enlistment and recruiting services, and intended to cause insubordination: that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used and you are at liberty to presume that the defendants intended the natural and probable result of the language used" (Tr. 145).

An Instruction in the Debs Case.

We call the attention of the Court to the following quotation from the opinion of this Court in the case of *Debs* v. *U. S.*, 249 U. S. 211, 216, as follows:

> "We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effects to obstruct the recruiting service, etc., and unless the defendant had *the specific intent so to do in his mind.*" (Italics for emphasis.)

Mr. Chaffee, in his book on Freedom of Speech in the United States, has given studious consideration to the question here under discussion and he says in substance (p. 130) that where the statute which creates the crime expressly requires a specific intent, probability that the prohibited thing will come about is not the test of the guilt of the accused, and that presumption will not supplant the intent specified in the law itself. In other words, the *statutory* intent must be proved, not inferred.

The books furnish illustrations of the principle here involved. In *People* v. *Landman*, 103 Cal. 577, there was an indictment for an assault with intent to commit murder. The defendant was convicted and denied a new trial. The trial court had instructed the jury as follows:

> "Every person is presumed to intend what his acts indicate his intention to have been; and if the defendant, at the time and place alleged in the information, voluntarily assaulted the prosecuting witness with a deadly weapon, in such a manner that the natural and ordinary consequences of such assault would be to kill the said witness Stanovitch, then the law presumes that the defendant intended to kill the said witness Stanovitch; and unless it appears from the evidence that the intention of the defendant was other than his acts indicated, the law will not hold him guiltless." (p. 579)

For the giving of this instruction the case was reversed in the Supreme Court, where the Court said:

> "In the offense here charged, a specific intent is the all-important element, and it is essentially a question of fact for the jury to decide. When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent; and therein is found the vice of the present instruction. The saving clause found in the latter portion of it does not cure the objection we have suggested. If it serves any purpose whatever it casts upon the defendant the burden of introducing evidence to disprove a state of facts created by a presumption of law, and no such burden can be cast upon a defendant in a case charging an offense of the present character. Of course, under these circumstances, a person's intent cannot be proven by direct and positive evidence, yet it is none the less a question of fact, to be proven like any other fact in the case, and all the circumstances surrounding the assault furnish the rule upon which its proper solution depends."

The same conclusion is reached in *Hibbard* v. *U. S.*, 172 Fed. 66.

Specific Intent Is Involved in the Means Alleged.

The allegation in the counts that the defendants wilfully did cause and attempt to cause insubordination, etc., and did wilfully obstruct, etc., is a charge that might be proven by various types of acts of the defendants. But the indictment goes on further and alleges a certain means through and by which it is said the defendants committed those crimes, *i.e.*, by publication and dissemination of certain articles which were by them *calculated and intended to induce* available and eligible persons to fail and refuse to enlist and submit to registration and *to cause* insubordination, disloyalty, mutiny and refusal of duty, etc. But the face of the documents do not bear out the allegations in the indictment so the Government had the burden of proving the specific intent alleged by other evidence *dehors* the documents.

The rule is that where the circumstances are such that the crime charged must have been done with a specific intent such intent must be alleged in the indictment and must be proved as alleged. (31 Corpus Juris 847, Sec. 461.) And where an offense may be committed in various ways the evidence must establish it to have been committed in the mode specifically charged in the indictment. (31 Corpus Juris 846, Sec. 460.)

The acts charged are said to have been accompanied with a special intent to accomplish a definite objective, to wit, the disruption of morale and the thwarting of enlistment.

There must be results, consequences, to be answered for, or one is not supposed to have intended the natural and probable.

But the rule as here applied by the Court was not adapted to the issue created by the Government's charges and was definitely misleading and suggestive of guilt, *i. e.*, the defendant was bound to intend, and hence, could not deny the consequences alleged.

The indictment in this case complies with the foregoing rule and sets out a special set of facts through which, it is alleged, the crimes charged were committed. The acts charged are said to have been accompanied with a special intent to accomplish a definite objective, to wit, the disruption of morale and the thwarting of enlistment.

Now the character of those allegations raises issues of *specific, actual, guilty* intent which the Government was bound to prove as laid. It was not enough to say that a presumption could be indulged from the face of *equivocal documents* and that from such documents defendants might be presumed to intend the natural and probable result of the language used. In a criminal case a specific intent is not to be presumed from the wording of equivocal documents. Extraneous evidence must be introduced, else the documents remain equivocal.

A simple illustration, we think will suffice. A defendant is charged with assault with intent to rob. It is shown in evidence that the assault was made and nothing more. The defendant goes free because it was not proven that he committed the assault with the specific intent charged. It would be error to charge the jury that the defendant was presumed to have intended the natural and probable

consequences of his acts for it is the intent that governs the guilt and makes the crime charged.

Intoxication to a degree of irresponsibility is a defense to assault with intent and other crimes where the act as charged is alleged to have been done with a specific intent in mind.

In the instance stated, of assault with intent to rob, the defendant, though intoxicated beyond possibility of mental intention to rob, could not interpose intoxication as a defense against simple assault itself on the ground of no specific intent to assault; but he could defend against a charge of specific intent to rob, on the ground of intoxication.

There are cases where it has been said that a defendant is bound to have intended the natural and probable consequences of his language used in a pamphlet but when examined it will be seen that the Court was holding that his language was so plain on its face that there was no doubt of the intention and the party was not heard to deny it.

The rule is really one of a type of estoppel commonly used in civil cases, where it is said that one is bound to intend the natural and will not be permitted to deny the obvious; as where the Court will not hear the plaintiff say that as he approached the crossing he looked and did not see the approaching train when if he had looked he must have seen. There it was.

But the rule as here applied by the Court was not adapted to the issue created by the Government's charges and was definitely misleading and suggestive of guilt, *i. e.*,

the defendant was bound to intend, and hence, could not deny the consequences alleged, *i. e.*, consequences assumed, by the form of the expression, to exist.

A Criminal Attempt Has No Results Except Failure.

And particularly we urge that the instruction was misleading and completely in error when we consider that Counts 2, 4 and 6 contained the allegation of a criminal attempt, that is, that defendant did cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces, as well as having actually caused those conditions in the service.

The books agree that there are three elements in the crime of attempt, (1) the intent to commit the crime; (2) doing of some overt act in part execution of the intent; and (3) failure to consummate the crime (16 Corpus Juris 113).

In proving an attempt to commit a crime, a *guilty* intent must be shown; and it must not only be shown that there was a guilty intent, but there must be a *specific* intent to do the particular thing (1 Bishop's New Crim. Law, p. 466; *Dahlberg* v. *People*, 225 Ill. 485, 488). "To convict one of an attempt to commit a crime, it is necessary to show that the overt act was done with the specific intent to commit that particular crime. Such an intent is essential." (16 Corpus Juris 113.)

As we interpret the holdings, this rule,—that one is presumed to intend the natural and probable consequences of his acts or language, as here said, has no application to criminal attempts for, in the law of attempt there are no consequences; there is only failure. Intent, act, failure.

All of which demonstrates that the law of specific intent is applicable to the crimes created by Section 33 when the crime is alleged to have been committed by printing, publishing and disseminating writings upon political and controversial subjects in which their purpose and intent is not on their face definitely stated by the writer to be the same purpose and intent alleged on the face of the indictment by the pleader.

The Means Alleged in an Indictment Must Be Proven As Laid.

It has always been held that the allegation of the means by which a crime is committed when there is more than one way of commission, is an essential part of the indictment, and being essential, must be proven as laid; and so it is that if the means by which a crime is alleged to have been committed requires a specific intent, a specific intent must be proven to have accompanied the act and shall not be presumed from the act itself; the step of logic is from cause to effect, and not from effect back to cause.

To illustrate that proof of the means alleged is essential and material, a look at *People* v. *Guedel*, 43 Ill. 226, will interest. There Guedel was acquitted of murder by *shooting* the victim with a gun and was promptly reindicted for the same murder of the same party by *beating* him with the same gun; and it was held on plea of the prior proceeding that the acquittal under the first indictment was no bar to a prosecution under the second. Means is material.

The Action of the Court Lessened the Degree of the Government's Proof.

We think the Court erred in weakening or lessening the degree of proof necessary to establish the Government's case. It alleged the crimes were committed by a means involving a specific intent and we say the Court should have held the Government to strict proof of its allegations, and not given it a short cut to a verdict by way of a presumption.

VII.

The Circuit Court of Appeals, in Affirming the Judgment, Has Usurped the Functions of the Jury By Deciding the Question of Specific Intent, a Question of Fact Upon Which the Trial Court Refused to Instruct the Jury, and Upon Which the Jury Did Not Pass for That Reason.

We think it obvious that the Circuit Court of Appeals invaded the province of the jury, for the reason that the trial judge refused to give to the jury the requested instruction as to the necessity of proof of a specific intent to do the prohibited acts, and the question of intent being a jury question, the defendant has not had his day in court upon it. The Circuit Court of Appeals by assuming to decide that fact usurped the function of the jury.

In effect the Circuit Court of Appeals has made itself the jury, has sat upon the rights of the defendant, and, as if it were the jury, has decided a question which the law has entrusted exclusively to the judgment of the jury; and has actually substituted the Court's judgment for

that of the jury; for upon that question of fact the jury should have been, but was not, permitted to pass.

We think this Court answered the question in the following quotation from the case of *Pierce* v. *United States*, 252 U. S. 239, 250, as follows:

> "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it *in the mode adopted*, and what were defendants' *motives in doing this*, were questions for the jury, not the court, to decide." (Italics ours.)

And we point out that what was there said was in a case where the documents were replete with statements having direct reference to the recruiting service which are quoted at large in the dissenting opinion at pages 256-264. There, with the documents full of violent language and distributed openly amongst persons likely to be affected, the Court yet considered that the matter was one for the jury, upon the intent. The reviewing court could there itself see the seditious nature of the documents upon their face and yet held that as the jury had the right to pass upon the question of intent involved, the Court would not disturb the judgment of the jury where it appeared that the jury *had passed* upon the intent with which the articles were distributed.

But how different the *Pierce* case is from this case;—there the jury had passed upon the intent where the documents were full of denunciations of drafting and recruiting of sons as they grew to soldier size, distributed among the prospective personnel of the armed forces; so the high court would not undo what the jury had advisedly done. There the Court did not interfere with the right of the jury to pass upon the question of intent, but held it to be the province of the jury so to do, and that the jury *had done so.*

Here the pamphlets were distributed by letter to persons of intelligence, which pamphlets, when examined, make no direct reference to the military or naval forces or the recruiting or enlistment service of the United States; whereas, in other cases cited on hearing, there was specific reference upon the face of the documents from which specific intent could be found, and in none of which was this question raised.

But here the specific intent of the defendant was not permitted to reach the jury upon the question of the circulation of articles having no reference to the armed forces or the service; and the Circuit Court of Appeals affirmed the action of the trial judge in denying that right; yet almost in the same sentence, saying that the defendant has that right.

Now it will be noted that there is a wide difference between telling a jury that a defendant might be *presumed* to intend the natural and probable *result of language used* and telling the jury that the acts of a defendant in such case as this must be done *with an actual specific intention* in mind to commit the *offenses charged in the indictment;* one is general intent, the other specific intent.

A Specific Intent Cannot Be Presumed From Consequences Where There Are No Consequences.

The specific intent must come first in point of order as, in attempts, or acts done with intent, there are no results (except failure) to be responsible for.

Where the act itself does not *inherently* carry with it the proof of a specific intent a specific intent must be shown by independent proof to have accompanied the act.

Consequences must be in the mental contemplation and purpose of the offender when he does the act; but that is to be proven, not *presumed from consequences,* for there are no consequences from which to draw a presumption.

So we say that in affirming the judgment, the Circuit Court of Appeals denied the right of trial by jury upon a controlling question of fact in the case, and usurped the functions of the jury to decide the question of fact itself.

Conclusion.

Wherefore we respectfully suggest that the judgment appealed from should be reversed.

All of which is respectfully submitted.

ODE L. RANKIN,
BENEDICT J. SHORT,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 531

ELMER HARTZEL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF ELMER HARTZEL, PETITIONER.

ODE L. RANKIN,
BENEDICT J. SHORT,
Counsel for Petitioner.

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Statement.

So far as the facts of this case are concerned, after analysis by opposing counsel, they remain the same as stated in petitioner's brief filed herein. Some inferences, differing from those of petitioner, are drawn by Government Counsel but they do not *supply evidence* which the Government failed to produce, nor change the controlling effect of that *lack of* evidence. The documents stand alone so far as intent is concerned, and arguments do not increase their probative effect.

Opposing counsel call attention to the fact that a bundle of 188 addressed envelopes was found in a paper sack, with literature, in the bathroom of Hartsel's home. They were not shown to have been used for any purpose, nor for what purpose they were intended to be used. No point was made on the trial as to the envelopes other than the fact that the 188 envelopes were so found (Rec. 21, 30). They were not particularized in the bill of exceptions.

The three articles set out in the indictment are copied in full in the Government's brief but when looked at they do not disclose any reference to the charge made in the indictment, neither to the draft, volunteering, army, or the naval forces, or the war service, or any objectives to which the law is directed.

The statement as credited to Hartzel in the Government's brief, page 14, that the mailing of the documents "was not to improve the morale of the troops" (R. 84), was in response to the District Attorney's question put on cross examination as to whether he had written the articles for the purpose of improving the morale of the troops. The fact is that, on the contrary, the documents show they were not written with the Army, Naval or other forces in mind. In answer to a question of the District Attorney Hartzel said,

> "I had no intent to do anything or any of the things charged in the indictment or to undermine the morale of the troops" (R. 84).

Hartzel explained that he sent the documents out anonymously because he almost lost his job several times (R. 84).

But looked at from any angle, the essential facts remain the same: The documents bear no reference upon their face to any of the things prohibited by the statute, and no proof of specific intent was made independently thereof; and that the articles went out under seal to headline per-

sonalities, individually, and were not published generally to the world, nor to the armed forces; so the facts of this case bear no similarity nor resemblance to the cases cited by the Government.

We reply to the Government's arguments in the order presented.

I.

The court did not and would not refer to the necessary specific intent in his instructions to the jury.

We point out that the Court would not utter the words "specific intent" before the jury, although requested, definitely, when in chambers in conference as to instructions prior to the charge, to instruct the jury as to specific intent, and to charge the jury that defendants

> "were charged with having done those acts with a criminal intent in mind; that the intent charged in the indictment is what is known in law as a specific intent which means that the defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some or more of them did the acts charged in the indictment, still the jury may not find the defendants or either of them guilty as charged unless the jury also find that the acts were done with *an actual or specific intention in mind to commit the offenses charged in the indictment;* and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts, or of the language used, *unless the jury also find that such actual, specific intention accompanied said acts.*" (R. 87) (Italics here for emphasis)

But the court did not so instruct, and on the contrary, charged only as to general intent *without differentiation as between general and specific intent;* and when again requested to do so the court, instead of using the words

"specific intent" made the charge *more general* by telling the jury they were at liberty

> "to presume that the defendants intended the natural and probable result of the language used." (R. 99)

which was telling the jury that if they found a general intent from the face of the documents they might find defendant guilty without and regardless of all specific intent.

Counsel for the Government infer at pages 25 and 26 of their brief that counsel for Hartzel was satisfied with the charge made to the jury on the subject of specific intent, but the record does so show that what counsel did do was to urge upon the trial judge that he give an instruction to the jury which would cover the point of *specific intent*, or *particular intent*, or whatever the judge might call it in his own language, just so the jury were instructed upon that point.

But the court did not do so, and, he would not put the words "specific intent", or particular intent into the ear of the jury, nor give them an equivalent expression.

Government's counsel say at page 26-27 of their argument that

> "The emphasis throughout the charge was on the requirement of specific intent",

which is an exactly opposite meaning to the wording of the charge.

Opposing counsel also say at page 27 of their argument,

> "A lay jury would be even less likely than a trained lawyer to find in the charge any antithesis between specific intent and a constructive intent presumed as a matter of law."

We reply that first, there is no presumption of law to be indulged in such case; for such ruling shifts the burden of proof to the defendant and correspondingly relieves the Government of making essential proof; and second, we say, certainly the jury would hardly see any difference between a "specific intent", a "general intent" and a "presumed

intent" *unless the judge should educate the jury upon the difference* between those types of intents by *differentiating them in his charge*. And that is just the objection here made; and the refusal of the court to be specific, and to so charge the jury, is the error of the trial court complained of.

The refusal of the court to so charge made the difference between innocence and guilt; i.e., between the constitutional right to freedom of speech and the denial thereof,—the right to mail letters to head line personalities under seal and the denial thereof. Without that instruction as to the specific, guilty intent, properly spoken to the jury, and driven home by differentiation, the defendant did not have a trial by jury upon the very ultimate issue in the case: whether he, at the time of mailing out the documents, mailed them *with the specific intent charged in the indictment*.

And the Circuit Court of Appeals, by its decision, then cut defendant out of a jury trial by holding that while Hartzel was entitled to have the jury pass upon that question of specific intent, yet they denied him that right *by affirming the case* and itself passing upon the very question that should have been submitted to the jury, but which the trial court withheld from the jury by ignoring in the face of requests.

Of course, as opposing counsel suggest, the attorney for defendant was pleased to have the court instruct the jury upon the clear and present danger theory, and, obviously upon the theory that such an instruction, if coupled with an instruction as to specific intent, would have meant that defendant would have been found not guilty, for the letters presented no clear and present danger, and no specific intent had been shown.

Of course we made no request for the court to instruct the jury that it must limit its consideration to the documents alone, for there was no such right, but we did ask that the jury be told that from all the evidence it was necessary that a specific intent appear, and we did ask for a directed verdict, which protested the point.

Opposing counsel say that this court, in the cases of *Pierce* v. *U. S.*, 252 U. S. 239, *Abrams* v. *U. S.* 250 U. S. 616 and *Schaefer* v. *U. S.*, 251 U. S. 466 has upheld convictions without insistence upon a showing of specific intent. On the contrary the very dispute in those cases was upon the question whether the specific intent was upon the face of the documents.

In the *Pierce* case the document in question had many violent expressions on the subject matter of the draft and armed forces; the documents in the *Abrams* case likewise contain violent language. The *Schaeffer* case was based on publication in a newspaper of false reports where guilt was based upon the face of the document tested by the truth of the matter involved. In those cases the intent was shown by what appeared upon the face of documents and the point here made is that there is an absence of language on the face of the documents tending to show a specific intent. There is the difference.

We are not here contending that the trial court did not give a dispassionate charge (as it is characterized by opposing counsel,) to the jury but we do say that the court refused, after repeated requests, to charge the jury definitely upon specific intent,—*the exact type of intent inherent in the crime* and did tell the jury that they could *presume intent* from the evidence, this excusing the Government from the necessity of making proof.

II and III.

The evidence does not sustain the conviction for obstructing the recruiting and enlistment service, or for causing or attempting to cause insubordination, mutiny, etc.

There can be no question here but that the objective of defendant Hartzel was solely to criticize certain elements, individuals and governments, and that his intent applies di

rectly to the obvious, not indirectly to some one, or character, or purpose not mentioned. And that is just the reason why specific intent must have been independently proven. Specific intent cannot be *presumed*, for, to give such evidence the character of a presumption, shifts the bruden of proof to the defendant, who must then combat something that does not exist in fact, but only in fiction. He must shadow box to knock down a straw man.

Whenever it becomes necessary to make an *argument* to prove that a specific intent arises out of the face of a document, just there it becomes obvious that no specific intent was shown, for it is the very absence of specific intent that makes it necessary to argue,—to show a plausibility,—not a fact. It is *fact beyond doubt*,—not arguments, deductions, or presumptions, that show specific intent.

What is an obstruction? Obviously, something that gets in the way and becomes a hindrance to the Government to replenishing the man-power. Writing to high ranking officers of the armed forces would not in anywise obstruct recruiting or the draft, nor would the writing to other persons of headline quality. Congress obviously meant just what it said in the Act, and no more. There is no crime if no obstruction is *wilfully* accomplished. It is a thing done that can be seen and known,—not merely visioned or thought of,—that is, contemplated by the law. Neither argument nor presumptions are *substitutes for proof* when it is sought to be shown that a specific intent arises upon the face of a letter written to others.

There should be no straining of the law to punish a person for something he did not intend nor in fact commit. The proof does not show a crime within the Sedition Act and that law cannot be stretched broad enough to cover it.

The independent proof made by the Government had no tendency to show that the defendant Hartzel ever had in-

mind the draft, volunteer service or subject matter of the statute.

To sustain the conviction on any count in the indictment is to put sentiments into the defendants mind he never entertained and to write facts into the documents that do not there appear.

After all the inquiry here is as to whether there was a specific guilty intent in the mind of Hartzel to violate the Sedition Act.

Conclusion.

Specific intent is an essential element of the crime in question here where the Government has set out in the indictment, as a means, the publication and dissemination of certain articles, of which only, the crime was *said to have been committed*. That allegation could only be proven by showing that the defendant had, when he mailed the documents, an actual, guilty, specific intent to produce the results charged. The Government made no showing of intent beyond the faces of the documents, and they showed none. Collateral proof of incidents did not give to the faces of the documents any more force than is obvious thereon.

So no crime was proven and the judgment of the Circuit Court of Appeals and the District Court should be reversed, which is respectfully requested.

Respectfully submitted,

Ode L. Rankin,
Benedict J. Short,
Attorneys for Petitioner.

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No. 531

In the Supreme Court of the United States

OCTOBER TERM, 1943

ELMER HASTIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 175–183) is reported at 138 F. (2d) 169. The memorandum opinion of the trial judge denying petitioner's motion for a new trial appears in the record at pages 147–154.

JURISDICTION

The judgment of the circuit court of appeals was entered October 14, 1943 (R. 184), and a petition for rehearing (R. 185–201) was denied November 10, 1943 (R. 203). The petition for a writ of certiorari was filed December 10, 1943. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to warrant the jury in finding that petitioner in publishing and distributing the allegedly seditious pamphlets, wilfully attempted to cause insubordination, disloyalty, mutiny, or refusal of duty in the armed forces.

2. Whether it was proper for the trial judge to instruct the jury that in determining petitioner's intent they were at liberty to presume that he intended the natural and probable result of the language used.

STATUTE INVOLVED

Section 3 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, 41 Stat. 1359 (50 U. S. C. 33), provides in pertinent part as follows:

> Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

STATEMENT

Petitioner and two others were charged in a seven-count indictment (R. 2–15) returned in the United States District Court for the Northern District of Illinois with violations of Sections 3 and 4 of the Espionage Act of 1917 (50 U. S. C. 33, 34) by publishing and disseminating, in time of war, three pamphlets—one entitled "The British, an Inferior Breed," another "The Jew Makes a Sacrifice," and the third designated in the proof as "The Diseased Spinal Cord" (R. 73) but untitled in the indictment. Counts 1, 3 and 5 charged that by these actions the defendants unlawfully, wilfully and knowingly obstructed the recruiting and enlistment service of the United States; counts 2, 4 and 6 charged that they unlawfully, knowingly, and wilfully caused and attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States; and count 7 charged a conspiracy to violate Section 3, in violation of Section 4 of the Espionage Act (R. 2–15).

Petitioner was found guilty on all counts (R. 146, 154) and was sentenced generally to imprisonment for five years (R. 154). On appeal his conviction was affirmed (R. 184).[1]

[1] Petitioner's co-defendants, Mccartney, an attorney, and Soller, the mimeographer of the pamphlets, were found guilty on counts 5, 6 and 7 (R. 156), but their convictions were set aside—Mccartney's by the trial judge on motion for a new trial (R. 154), and Soller's by the circuit court of appeals on the ground that there was no proof that he knew

The essential facts are undisputed. In 1942 petitioner wrote the three articles charged in the indictment, had them mimeographed by his co-defendant Soller, and sent out about six hundred copies to persons on his mailing list (R. 79, 127–128). In order to avoid detection, he deposited the envelopes in several different mail boxes and endeavored to leave no fingerprints (R. 131–132). He stated that he compiled his mailing list from various sources—lists of persons prominent in the America First Committee; commanders of the American Legion; organizations which he considered patriotic, such as the Daughters of the American Revolution and We the Mothers Mobilize; fraternities, sororities, and labor unions (R. 79, 127–128). The Government proved that one or more of the pamphlets were mailed to the United States Infantry Association (R. 18–19), the Commanding General of the United States Army Air Forces (R. 19), Colonel Hastings of the General Staff (R. 19), the President of Northwestern University (R. 20), the American Newspaper Publishers Association (R. 20), the Lions International (R. 21), the Kiwanis International (R. 21–

what use petitioner made of the pamphlets (R. 182–183). Since these two defendants were the only co-conspirators of petitioner named in the indictment, the setting aside of their convictions makes it impossible, of course, to sustain petitioner's conviction upon the basis of the conspiracy count. However, petitioner was found guilty on all of the other counts of the indictment and the sentence rendered was one permissible under any of those counts.

22), the Air Line Pilots Association (R. 22), and the American Legion (R. 22).

The pamphlets are set out in full in the record (R. 70–75). They depict the war as a betrayal of the United States to the "British Jewish yellow race" by the President (R. 70). The British are characterized as an "inferior breed" and a "degenerate empire" (R. 70); the Jew as an "oriental hyphenated American, propagandist for bloody Joe and the British (Jewish) empire," waiting until "many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest" (R. 71–73); the personal references to the President appear at pages 74–75 of the Record. The concluding portion of one of the pamphlets (*ibid.*) advocates starvation of our allies, our internal dissolution, and "occupation by foreign troops until we are able to stand alone."

In his instructions to the jury the trial judge quoted from the opinion of this Court in *Schenck* v. *United States*, 249 U. S. 47, 52, as follows:

> The question in each case is whether the words used are used in such circumstances or [are] of such a nature as to create clear and present danger that they will bring about the effect [the substantive evils] that Congress has the right to prevent [R. 137].[2]

[2] The precise language of the *Schenck* opinion is contained in brackets.

In respect of the intent which the jury was required to find before they could convict, the judge instructed the jury:

> It is charged in the indictment they [the pamphlets] were intended to produce those results. In determining whether they were used with that intent, you will take into consideration all of the circumstances in the case, and you must take into consideration the words used, and whether from the words used themselves you could find that there was such intent, and you are at liberty to infer that, to take into consideration the language used, the intention and the probable result of such language used, you are at liberty to infer that from all of the facts and circumstances that you have heard testified to here in the evidence, the circumstances under which they were issued. [R. 138.]

In response to a request by petitioner's counsel for a more detailed instruction on the specific intent required under the statute (R. 141, 143, 144–145), the judge charged:

> It is necessary for the government to prove that the defendants intended to interfere with the enlistment and recruiting services and intended to cause insubordination. I thought I covered that, but if I did not, that is a necessary element of an offense, and in determining whether there was such an intent you must consider all

> the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used. [R. 145.]

ARGUMENT

The circuit court of appeals based its affirmance of the judgment on those portions of counts 2, 4, and 6 which charged attempts to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States (R. 179–180, 182). Although we think it is clear that the judgment may also be affirmed on the counts charging obstruction of the recruiting and enlistment services of the United States, the questions raised by the petition for certiorari need be considered only as they relate to the counts affirmed by the court below.[1]

1. Petitioner contends (Pet. 18, 25, 26–31) that the evidence was insufficient to support the jury's finding that he intended to cause insubordination, disloyalty, mutiny or refusal of duty in the military

[1] Since the general sentence imposed was less than the maximum which could have been imposed on any one count, the judgment will be sustained if the evidence supports the conviction on any count. *Hirabayashi* v. *United States*, 320 U. S. 81, 105; *Whitfield* v. *Ohio*, 297 U. S. 431, 438; *Brooks* v. *United States*, 267 U. S. 432, 441; *Pierce* v. *United States*, 252 U. S. 239, 252–253; *Abrams* v. *United States*, 250 U. S. 616, 619.

or naval forces of the United States.[4] He predicates his argument on the assertions that the pamphlets do not on their face counsel disloyalty or insubordination and that the Government failed to prove circulation among the armed forces. The pamphlets, however, had one obvious purpose, apparent on their face—to persuade the readers that the present war was a gross betrayal of the United States by the President for the benefit of the British and the Jews. Indeed, petitioner himself admitted on cross-examination that he thought "the troops" ought to know the consequences of the war, that they ought to consider whether America was betrayed, and that he was opposed to the Americans and British invading Europe (R. 132). In addition, the proof established that the first two articles were sent to the Commanding General of the Air Forces and to Colonel Hastings of the General Staff; and that all three articles were sent to the United States Infantry Journal whose personnel included army officers of high rank (R. 18–19). Unquestionably, if petitioner had succeeded in inculcating his point of view among persons of such authority, if he had been able to convince them that their commander in chief was as represented, that the war was the "beginning of insanity," he would have caused insubordination and disloyalty in the military forces. That our high ranking officers proved

[4] As shown in the Statement, *supra*, pp. 6–8, the trial judge expressly instructed the jury that, before they could convict, they must find that petitioner distributed the pamphlets with

immune to such propaganda does not of course exonerate petitioner from liability under the statute for his attempt so to influence them.[5]

2. Petitioner complains (Pet. 32–37) of that portion of the instructions in which the trial judge told the jury that, in determining petitioner's intent, they were "at liberty to presume that defendants intended the natural and probable result of the language used" (R. 145). This instruction is supported by the decisions of this Court in sedition cases[6] and by decisions under other statutes requiring proof of a specific criminal intent.[7] The validity of such a presumption has been disputed when applied to situations where the allegedly seditious utterances were primarily designed to further some objective other than obstruction of the war effort and where such obstruction was merely an incidental and perhaps

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intent to interfere with the recruiting and enlistment service and to cause insubordination. It is, therefore, clear that the jury found that petitioner had the specific intent to commit the crimes charged.

[5] Since, as we have shown, the evidence was sufficient to take the attempt counts to the jury, no issue of infringement of freedom of speech is involved and petitioner's argument (Pet. 26–31) to the contrary is untenable.

[6] *Pierce* v. *United States*, 252 U. S. 239, 249; *Abrams* v. *United States*, 250 U. S. 616, 621; *Debs* v. *United States*, 249 U. S. 211, 214–215. See also *Kirchner* v. *United States*, 255 Fed. 301, 305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.

[7] *United States* v. *Patten*, 226 U. S. 525, 543; *Agnew* v. *United States*, 165 U. S. 36, 53; *Allen* v. *United States*, 164 U. S. 492, 496; *Reynolds* v. *United States*, 98 U. S. 145, 167; *United States* v. *Anderson*, 101 F. (2d) 325, 330 (C. C. A. 7), certiorari denied, 307 U. S. 625.

an undesired consequence.[8] In the instant case the instruction merely had the effect of authorizing the jury to find that pamphlets circulated among high army officers which on their face disclose an intent to cause disaffection with the war and contempt for the commander in chief were distributed with intent to cause disloyalty in the armed forces. Such an inference as to petitioner's intent is inevitable from the circumstances in this case, without the aid of the presumption to which the district court adverted.[9]

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[8] See dissenting opinion of Justice Holmes in *Abrams* v. *United States*, *supra*, pp. 628–629.

[9] Petitioner raises (Pet. 10–12) but does not argue the contention that the trial court erred in admitting in evidence pamphlets written and distributed by petitioner prior to the war. The judge specifically instructed the jury that these pamphlets were to be considered only on the question of petitioner's intent (R. 138). The admissibility of such evidence when limited to this purpose is well established. *Williamson* v. *United States*, 207 U. S. 425, 451; *Allis* v. *United States*, 155 U. S. 117, 119; *Wood* v. *United States*, 16 Pet. 342, 360–361; *Viereck* v. *United States*, 130 F. (2d) 945, 959–960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley*, 132 F. (2) 170, 180–181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States*, 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Hovenstine* v. *United States*, 263 Fed. 1, 5–6 (C. C. A. 9); *Stenzel* v. *United States*, 261 Fed. 161, 162 (C. C. A. 8); *Shidler* v. *United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman* v. *United States*, 257 Fed. 601, 603–604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States*, 256 Fed. 805, 811–812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States*, 255 Fed. 301, 304–305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1943.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 531

ELMER HARTZEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 118–126) is reported at 138 F. (2d) 169. The memorandum opinion of the trial judge denying petitioner's motion for a new trial appears in the record at pp. 101–108.

JURISDICTION

The judgment of the circuit court of appeals was entered October 14, 1943 (R. 126–127), and a petition for rehearing was denied November 10,

1943 (R. 127). The petition for a writ of certiorari was filed December 10, 1943, and was granted January 10, 1944 (R. 129). The jurisdiction of this Court is conferred by section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury concerning the offenses described in Section 3 of the Espionage Act of June 15, 1917, particularly with respect to the element of intent.

2. Whether there was evidence to sustain the conviction of petitioner on the counts charging an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces of the United States.

3. If the second question is answered in the negative, whether there was sufficient evidence to sustain the conviction on the counts charging willful obstruction of the recruiting or enlistment service of the United States.

STATUTE INVOLVED

Section 3 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, 41 Stat. 1359 (50 U. S. C. 33), provides in pertinent part as follows:

> Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty,

mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

STATEMENT

Petitioner and two others were charged in a seven-count indictment (R. 1–14), returned in the United States District Court for the Northern District of Illinois, with violations of Sections 3 and 4 of the Espionage Act of 1917 (50 U. S. C. 33, 34), by publishing and disseminating, in time of war, three pamphlets—one entitled "The British: an Inferior Breed," another "The Jew Makes a Sacrifice," and the third designated in the proof as "The Diseased Spinal Cord" (R. 49, 50, 52) but unentitled in the indictment. Counts 1, 3, and 5 charged that by these actions the defendants unlawfully, willfully and knowingly obstructed the recruiting and enlistment service of the United States; counts 2, 4, and 6 charged that they unlawfully, knowingly, and willfully caused and attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States; and count 7 charged a conspiracy to violate Section 3, in violation of Section 4 of the Espionage Act.

Petitioner was found guilty on all counts (R. 110) and was sentenced generally to imprisonment for five years (R. 111). On appeal his conviction was affirmed (R. 126–127).[1]

It is undisputed that petitioner wrote the three articles charged in the indictment, had them mimeographed by his co-defendant Soller, and sent out about six hundred copies of them, anonymously, to persons on his mailing list (R. 34–35, 58–60, 80–81). In order to avoid detection, he deposited the envelopes in several different mail boxes and endeavored to leave no fingerprints (R. 84–85). He stated that he compiled his mailing list from various sources—lists of persons prominent in the America First Committee; commanders of the American Legion; organizations which he considered patriotic, such as the Daughters of the American Revolution and We

[1] Petitioner's codefendants, Mecartney, an attorney, and Soller, the mimeographer of the pamphlets, were found guilty on counts 5, 6, and 7 (R. 110), but their convictions were set aside—Mecartney's by the trial judge on motion for a new trial (R. 108), and Soller's by the circuit court of appeals on the ground that there was no proof that he knew what use petitioner made of the pamphlets (R. 125–126). Since these two defendants were the only co-conspirators of petitioner named in the indictment, the setting aside of their convictions makes it impossible, of course, to sustain petitioner's conviction upon the basis of the conspiracy count. However, petitioner was found guilty on all of the other counts of the indictment and the sentence rendered was one permissible under any of those counts.

The evidence concerning Soller has been omitted in printing the record in this Court.

the Mothers Mobilize; fraternities, sororities, and labor unions, (R. 59, 80). The Government proved that the first two pamphlets were mailed to the Commanding General of the United States Army Air Forces (R. 17–18) and to Colonel Hastings of the General Staff (R. 18), and that all three pamphlets were mailed to the Infantry Journal, a service publication, and were read in the course of their duties by two Army officers (R. 17). It also showed that one or more of the pamphlets were mailed to the President of Northwestern University (R. 18), the American Newspaper Publishers Association (R. 19), the Lions International (R. 19–20), the Kiwanis International (R. 19, 21), the Air Line Pilots Association (R. 20), and the American Legion (R. 20). A batch of addressed envelopes was found in petitioner's home, secreted under a bathtub, together with several of the pamphlets (R. 21–22); 18 [redacted] of the envelopes were addressed to army officers (Gov. Ex. 41, R. 31), though petitioner failed to mention this class of addressees in describing his mailing list before trial (R. 59).

The pamphlets are set out in full in the record (R. 49–54). They depict the war as a betrayal of the United States by the President to the "British-Jewish yellow race." The British are characterized as an "inferior breed" and a "degenerate empire" (R. 49); the Jew as an "oriental hyphenated American, propagandist for

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bloody Joe and the British (Jewish) empire," waiting until "many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest" (R. 50, 52); the attack on Pearl Harbor was "evidence of justice" because "while trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific" (R. 50). The personal references to the President appear at pages 52–54 of the Record. The concluding portion of the third of the pamphlets (*ibid.*) urges, if necessary, starvation of our allies, our internal dissolution by a war of race against race, and "occupation by foreign troops until we are able to stand alone" (R. 54). Pamphlets of similar tenor, composed and distributed by petitioner in 1941, before our entry into the war, were received in evidence for the limited purpose of their bearing on petitioner's intent (R. 61–75, 56–57, 91–92). The full text of the three pamphlets specified in the indictment follows (R. 49–54):

THE BRITISH:

An Inferior Breed

Are they degenerate?

Plainly. Never again shall they be permitted to try to bring the slinking death of starvation to Europe, squealing hysterically as they do so about "freedom".

What is the present position of our "protectors," proclaimed saviors of Poland?

Now on the lease-lend dole, they are a kept woman.

Are they a cultured people?

Standing as an outpost to the continent of Europe, they are a parasite on its art, science and civilization.

In what way are they kept flying?

The Germans keep 'em flying wherever they find them. They run at the mouth as well as the bowels.

Will the British Isles be policed?

It will be unnecessary. When the people upon whom they are fastened withdraw their support, they will collapse.

What is the new blasphemy?

Making Christianity a slimy thing for those who crawl and creep by an island breed which—possessed of an empire obtained by aggression—points the finger of guilt at others. They are now fighting for Christ with bloody Joe.

Who betrayed America to the empire of the British-Jewish yellow race?

Rosenfeldt. We are victims of his Infantilism; he cannot stand alone.

Are Jews rushing forward to war after urging you to crush 'em?

No. But when America is exhausted they, as in Russia, will slither forth to sink their fangs into its body.

Are Americans United?

Yes. Externally with the corpus of a degenerate empire: internally with the sick body of "our leader".

What is behind the doctrine of "no appeasement"?

The fear of aggression on the bloated domains of an empire which cannot stand alone;

The inhuman cruelty of America's first blood soaked boom;

The rumble of world revolution—repercussion of its indecencies;

The effort of the Jew—vicious persecutor of peoples—to save himself;

The disease of a Paralytic who wants to be a hero as compensation for his ailment;

The beginning of insanity as the masses of the so-called "democracies" are led toward the destruction of Europe, homeland of the West.

Why was Pearl Harbor evidence of justice?

While trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific. Like a cow hit on the head by a hammer when led to slaughter, we now follow "our leader" as he moves forward on a sick spine to war.

THE JEW MAKES A SACRIFICE:

The Forthcoming Collapse of America

Our blood-soaked boom of the first World War was followed by a speculative orgy, then collapse. A similar maladjust-

ment now seeks an outlet in another blood-soaked boom which will end as before. In all of this the Jew—oriental hyphenated American, propagandist for bloody Joe and the British (Jewish) empire—has been an eager participant. Indeed, like a snake forced from its nest, the slimy blood lust of the "holy people" now stands revealed—for is it not evidence that the Jew hates bloodshed only when his own skin is in danger?

Let us consider briefly some of his characteristics.

The mentality of the Jew was exemplified recently by Leon Henderson when he wrote that "in 1942 as our contribution in the way of the merchandise of death, we are prepared to deliver a greater quantity of goods than this entire Nation had to keep it alive in 1932". The Jew, in fact, makes his way among those with whom he lives by boring from within—by aggression concealed under holiness and hatred of force. When cornered he makes loud outcrys about the guilt of others who "persecute" him.

He does not engage in many occupations such as that of a farmer, sailor, mechanic, necessary for the support of a state; he must, therefore, live among other peoples to prevent his own collapse. Since the weight of the community in which he lives does not rest upon him, his position as a specialized group is unstable; he oscillates back and forth, reflecting as he does

so fragments of what he considers the world to be, through all of which runs a thread of egoism which portrays him as a grand parasitic ruler.

He moves in a community with the idea of retaining his identity while at the same time reducing the disparity between himself and others by lowering standards, as in business. He escapes or is unfitted for many kinds of indispensable work, but makes a loud outcry about persecution when vents for his racialism are interfered with. As he lays concealed or slithers around within "democracy", part of his technique is to stress the need for tolerance, particularly so if, as in Germany, he is caught at his unclean work.

As a parasite he is sensitive to trends: he feels influence quickly which effect his welfare. Associated with his intrusion into the privacy of others in the interests of his own preservation is a fear of isolation. Connected with his frequent need for overcoming disgust for his person is an emphasis on money, wherewith he buys his way. Among related peoples—Turks, Arabians—he does not make much headway.

The Jew God is used for purposes of the greatest of all idolatries—self Worship and survival. For if a people believe they are "chosen" almost anything they do is regarded as right if it preserves them: God is used to get beyond good and evil. Note, for instance, the two sides of the

Bible—the first teaching vengeance, the second meekness. A vast scope is therewith obtained for emphasizing the side suited to his (or your) needs, that is, God becomes a two-faced instrument of torture—a bone crusher for use by the cunning. Today, in fact, almost any crime may be committed in his name in connection with fine words such as "freedom." How else justify blood-soaked booms; attempts to starve Europe by blockade; an alliance with bloody Jap; and the massing of enormous quantities of men and materials with which to "crush" the Germans—except by offsetting the degeneracy of such acts by declaring them to be dictated by the "spirit".

The oriental Japanese struck at Port Arthur in 1904, and at Pearl Harbor while negotiating. The Jew does not have their manfulness for open warfare, but he will—while conserving his own blood—eventually strike those with whom he lives in the back. He is now infiltrating into Government jobs under cover of "no race prejudice". He is, in fact, "dying" for the coming of bolshevism by making ready for your collapse. After many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest.

Are you not weary of the observation that the international parasite survives to see nations come and go? Distinguish then you must between white and yellow races or accept the slaughter of your sons by in-

ternal revolution of [or:] war abroad. Crush my enemies he screams! But there can be no further appeasement of his blood lust: no peace until the slaughter he brings to others returns upon himself. He must be eliminated as an active element in the community.

The Diseased Spinal Cord

Wilson died an invalid; Roosevelt became president one. What is the social significance of his condition?

A clue is given in the statement that syphilis is "the result of an illness of moral, social and racial instincts" of which prostitution is an integral part. Similarly the breakdown of Wilson after the "peace" was probably connected with reactions from the emotional debauchery of preceding years. It is, therefore, suggested that the epidemic of paralysis in New York State at a later time had a source in the weakening of nervous systems, brought about by the emotional self-masturbation of stories of the "bad" Germans.

Our leader—safe in Washington—escaped the actual horrors of war, but he could not escape the virus of a child's disease. As with syphilis his paralysis is indicative of severe maladjustments within the nation. He reproduces within his body our internal breakdown: he is in fact a degenerate who now seeks ways of having us cure him of his ailment.

United with a paralytic

With the cunning and sweetness of a cripple he kept us out of war. His duplicity is in part a result of a lack of coordination between brain and injured nervous system. Connected with the accompanying inferiority is a fear of isolation—a craving to be united. He would as a consequence extend his sickness over all the world. Almost everyone would then be equal, united, with no one able to stand alone.

Not long ago we "saved ourselves" by a program of relief—from the enervating effects of which we were unable to rise by manful effort. From the accompanying decay an external enemy was needed upon which to fasten the blame. Uniting with the decaying carcass of the British empire and war against the Germs were taken as solutions to the problems; they serve as counterpoises to our internal breakdown. For the condition of which his illness is a symptom requires continually widening spheres of action to prevent breakdowns from its ravages.

The enemy within

Hidden within the present program to save humanity are germs of infantilism, paralysis and death. For we now follow, not a little child, but a man with a child's disease.

I dare you to hit me said our leader to the "bad" dictators. He now twists on

his weak spine as we move irresistably toward the feared spectre—isolation. For as the people of Europe slowly unite to repel invaders who mouth over phrases about peace, God and civilization, many are beginning to recoil with horror from a proposed invasion of Americans who, as before, would only accentuate world revolution.

Crush my enemies screams Jewry; be bold; take the offensive; we'll back you up. We're fighting for freedom, says our leader, with his sick body coiled around the brain as with a snake prepared to strike. We're fighting to save Poland say the British hysterically; we hate other peoples' aggression.

America was betrayed. The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by:

A stench from rotting carcasses of those who would again invade Europe;

Starvation for millions of British who thought they could starve others;

Dissolution from an internal war of race against race;

Occupation by foreign troops until we are able to stand alone; and at last

The appointment of a bedside cabinet to investigate the condition of (Rosenfeld) our leader.

On cross-examination petitioner admitted that the purpose of mailing the documents was not to improve the morale of the troops; that he thought

the troops ought to know, and the country also, the consequences of war; that they ought to consider whether America was betrayed and if so, "to fight for Americans"; that he was opposed to the Americans and the British invading Europe. (R. 85).

In his instructions to the jury, the trial judge charged (R. 90–91):

> Now, it does not make any difference ordinarily what anyone may think about any race or people. One may be anti-Semitic or may be violently opposed to anti-Semitism, but he has a right to his private opinion. Ordinarily he has a right to express that opinion, and his opinion may be hateful to people, to other people, but he cannot be imprisoned because his opinion happens to be hateful to other people. He may not like the President of the United States, and he may like the President of the United States, and think the President can do no wrong, or he may hate the President of the United States and think the President can do nothing that is right. That is not the question in this case what individual opinions are. There is just this limitation, so far as this case is concerned: One the question of right of free speech with reference to the President or the people in charge of the administration of our affairs, the affairs of war, and that is, they are prohibited by this statute from any expression of opinion calculated, or which would like-

ly have the effect of interfering with recruiting or enlistment or which would cause insubordination in the army. Now, the two things must concur, and it must appear that the publication was calculated to have that effect, and that the defendant intended it to have that effect.

Now, you are to determine whether the publications were calculated to have that effect from the publication itself. It is for you to determine whether these publications, the language used in these publications, was calculated to have that effect, and then you will have the question of intent. I might say in this connection, I might, in describing the limitations on free speech, I might use the language that was used by Justice Oliver Wendell Holmes. He said: "The question in each case is whether the words used are used under such circumstances or of such a nature as to create clear and present danger that they will bring about the effect that Congress has a right to prevent."

That is the rule that you must apply in determining whether these publications were calculated to have that effect, as to whether the words used in these publications are such, or were used under such circumstances or were of such a nature as to create a clear and present danger that they would interfere with enlistment or recruiting or would cause insubordination in the army, because then they are pro-

hibited by the statute that I have read to you.

Then there is a question of intent. It is charged in the indictment they were intended to produce those results. In determining whether they were used with that intent, you will take into consideration all of the circumstances in the case, and you must take into consideration the words used; and whether from the words used themselves you could find that there was such intent, and you are at liberty to infer that, to take into consideration the language used, the intention and the probable result of such language used, you are at liberty to infer that from all of the facts and circumstances that you have heard testified to here in the evidence, the circumstances under which they were issued.

In response to a request by petitioner's counsel for a more detailed instruction on the specific intent required under the statute (R. 94, 98–99), the judge charged:

It is necessary for the government to prove that the defendants intended to interfere with the enlistment and recruiting services and intended to cause insubordination. I thought I covered that, but if I did not, that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circum-

stances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used. [R. 98–99.]

SUMMARY OF ARGUMENT

The general validity of Section 3 of the Espionage Act of 1917, sustained in *Schenck* v. *United States*, 249 U. S. 47, and related cases, is not here challenged. The questions involved relate to the correctness of the instructions to the jury and the sufficiency of the evidence to sustain the conviction. Since the sentence was a general one, and less than might have been imposed on any count, the judgment may be sustained if petitioner was properly convicted under either the counts relating to attempt to cause insubordination or disloyalty in the military forces or the counts charging wilful obstruction of the recruiting and enlistment service.

1. The trial court properly instructed the jury on all issues, including specific intent and clear and present danger. Throughout the charge the requirement of intent to bring about the evils denounced by the statute was emphasized. It was only as one factor from which the jury might infer the specific intent of petitioner that the trial court permitted them to consider the natural and probable result of the language used. Substantially the same charge on this issue was given in *Debs* v. *United States*, 249 U. S. 211, and was

expressly approved in the opinion of Mr. Justice Holmes for this Court. The trial court thus did not rely on the subsequent decisions of this Court (*e. g., Abrams* v. *United States,* 250 U. S. 616; *Pierce* v. *United States,* 252 U. S. 239), in which convictions were upheld without insistence upon a showing of specific intent to cause the results denounced by the statute. Likewise, the trial court followed the test of clear and present danger, attributing it, in the charge, to Mr. Justice Holmes. The charge as a whole was notably fair to the defendants. The jury was cautioned that individuals are entitled to express opinions which may be hateful to other people and that violent anti-Semitism or dislike of the President is not a ground of criminality.

2. The evidence was sufficient to sustain the conviction on the counts charging an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces. Petitioner's intention may be drawn from the pamphlets themselves, the circumstances of their distribution, and his pretrial statement and testimony, together with similar pamphlets prepared and distributed by him prior to our entry into the war. Among those to whom the pamphlets were sent were several important army officers. Additional addressed envelopes were found secreted in petitioner's house, containing the names of other army officers. The documents themselves depict the war

as a gross betrayal of this country by the President, denounce our allies as degenerate, and call for an abandonment of the war in favor of a racial struggle against the so-called yellow races, including the British. When addressed to military personnel, these appeals were an attempt to break down the will to carry on the war and to induce members of the armed forces to turn the war against their allies and comrades in arms. There was no showing of a more dominant intention on the part of petitioner, such as an endeavor to win converts to a political or economic doctrine. This is not a case of criticism of strategy or leadership or objectives in the war; nor is it a case of utterances which might merely have the effect of causing discontent. Petitioner admitted in his testimony that the effect of stating to military personnel that they had been betrayed would be to have them consider whether this were so, and if so "to fight for Americans." In the idiom of petitioner, this meant to fight against those united with us in the war and against other Americans.

The jury was entitled to find that petitioner's activities constituted a clear and present danger of bringing about insubordination or disloyalty among members of the armed forces. Those activities plainly amounted to an attempt within the criminal law; and the clear and present danger test as formulated by Mr. Justice Holmes bears

obvious relationship to the concept of an attempt. No further acts on petitioner's part were necessary. He is not relieved of responsibility for an attempt by reason of the strength of the intended victims. It cannot be said, as a matter of law, that petitioner's endeavor was so fanciful that it must be classed with attempts to cause death by witchcraft. Such a conclusion would ignore much recent history and the deliberate use of psychological warfare by belligerents. It would ignore, also, the military situation at the time the pamphlets were distributed. The nation's power of self-protection and protection of its armed forces against deliberate attempts to subvert them in the midst of war has been exercised by Congress upon a judgment that in such quarters, and at such a time, the remedy for evil counsels cannot await the process of correction by counter-persuasion. Cf. Brandeis, J., dissenting, in *Gilbert* v. *Minnesota*, 254 U. S. 325, 336–338.

3. If it is necessary to consider the counts relating to obstruction of the recruiting and enlistment service, it is submitted that the evidence also supports the conviction on that charge. Although the statute does not in terms deal with attempts so to obstruct, the concept of obstruction itself includes the placing of impediments in the way, even though actual prevention of enlistment or recruiting is not shown. It is settled, moreover, that the statute applies as well to the processes of com-

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pulsory service as to voluntary enlistment. Among those to whom petitioner addressed his pamphlets were the Airline Pilots Association, the American Legion, fraternities and labor unions. The jury was entitled to find that he intended his publications to weaken the will to join the armed forces. In counseling the destruction of those who would invade Europe, and the occupation of the United States by foreign troops if necessary, petitioner urged responses on the part of his addressees which are incompatible with voluntary enlistment or the orderly processes of the draft.

ARGUMENT

The general validity of Section 3 of the Act of June 15, 1917, under which the present conviction was had, is not here challenged. It was sustained by unanimous decisions of this Court twenty-five years ago. *Schenck* v. *United States*, 249 U. S. 47; *Baer* v. *United States, ibid.*; *Debs* v. *United States*, 249 U. S. 211; *Frohwerk* v. *United States*, 249 U. S. 204; *Sugarman* v. *United States*, 249 U. S. 182. Mr. Justice Holmes, who wrote the opinion in each of these cases, said in *Schenck* v. *United States, supra*, at 52:

> When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

The questions raised in the present case relate to the correctness of the trial court's instructions to the jury and the sufficiency of the evidence to sustain the jury's verdict. These questions must be considered, of course, in the light of the provisions of the statute and the applicable decisions of this Court dealing with the permissible limits of restrictions on speech in time of war. Before considering the correctness of the charge and the sufficiency of the evidence in the light of these standards, it should be observed that the judgment of conviction must be sustained if it can be upheld on any of the substantive counts of the indictment.[2] The verdict was a general one, and the general sentence of 5 years was less than might have been imposed under any single count; the statute authorizes sentence up to 20 years. In these circumstances it is well established that a conviction properly had on one count will sustain the judgment. *Hirabayashi* v. *United States*, 320 U. S. 81, 105; *Whitfield* v. *Ohio*, 297 U. S. 431, 438; *Brooks* v. *United States*, 267 U. S. 432, 441; *Pierce* v. *United States*, 252 U. S. 239, 252–253; *Abrams* v. *United States*, 250 U. S. 616, 619. In short, the conviction was properly affirmed if it is supported either under the counts charging an attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the

[2] We do not rely on the conspiracy count, for the reason stated *supra*, p. 4, footnote 1.

United States or under the counts charging willful obstruction of the recruiting and enlistment service of the United States.

I

The trial court properly instructed the jury on all issues including specific intent and clear and present danger

The principal objection raised by petitioner to the trial court's charge concerns the instructions on the element of specific intent. This was the only portion of the charge to which counsel for the petitioner took exception (R. 87, 94–99). In this Court the petitioner argues (Brief, pp. 57–66) that the instructions given did not require the jury, in order to render a verdict of guilty, to find that the petitioner specifically intended to bring about the results described in the statute. We submit that the instructions did so require and were entirely correct.

In his main charge the trial judge said (R. 91):

> * * * It is for you to determine whether these publications, the language used in these publications, was calculated to have that effect, and then you will have the question of intent.

After stating the clear and present danger test, obviously having reference to the first portion of the statement quoted above, the court continued (R. 91):

> Then there is a question of intent. It is charged in the indictment they were in-

> tended to produce those results. In determining whether they were used with that intent, you will take into consideration all of the circumstances in the case, and you must take into consideration the words used, and whether from the words used themselves you could find that there was such intent, and you are at liberty to infer that, to take into consideration the language used, the intention and the probable result of such language used, you are at liberty to infer that from all of the facts and circumstances that you have heard testified to here in the evidence, the circumstances under which they were issued.

Further in the charge the court recurred to the issue of specific intent and stated (R. 92):

> The charge is that the defendants published and disseminated these documents with the intent to interfere with enlistment and with an intent to cause insubordination. That is the question for you to determine, not whether any person actually was injured, but whether the publications were issued for that purpose and with that intent and were calculated to have that effect.

Counsel for the defendant, at the close of these instructions, referring to the portions on specific intent, stated: "I thought that was a little more liberal than the government was entitled to" (R. 96). Counsel added: "If you make a statement with reference to the specific intent, the

particular intent, whatever you want to call it, I will be satisfied with it" (R. 97). Thereupon the court gave additional instructions to the jury including the following (R. 98–99):

> It is necessary for the government to prove that the defendants intended to interfere with the enlistment and recruiting services and intended to cause insubordination. I thought I covered that, but if I did not, that is a necessary element of an offense, and in determining whether there was such an intent you must consider all the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used.

The clause of which petitioner now complains is the concluding one, "and you are at liberty to presume that the defendants intended the natural and probable result of the language used." It is clear from the context that this statement was not, and could not have been understood to be, an alternative to a requirement of specific intent. On the contrary, the jury was explicitly instructed that in inferring the intent of petitioner they were entitled to take into consideration all the circumstances, including the language used, the circumstances under which it was used, and the natural result of such language. The emphasis

throughout the charge was on the requirement of specific intent; since this is a matter necessarily of inference, it was entirely proper to include as one, but only one, of the circumstances to be considered the probable consequences of the language employed. A lay jury would be even less likely than a trained lawyer to find in the charge any antithesis between specific intent and a constructive intent presumed as a matter of law.

Substantially the same charge on this issue was given in *Debs* v. *United States, supra,* and was unanimously approved by this Court. In that case the trial court said: "In passing on the question of the defendant's intent, you should also bear in mind that a person is presumed to intend the natural and probable consequences of his words and acts" (Record in No. 714, 1918 Term, p. 276). Indeed, the trial court went further in that case and said: "Ought he not to have reasonably foreseen that the natural and probable consequences of such words and utterances would or might be to cause insubordination, disloyalty, or refusal of duty in the military forces of the United States?" (*ibid.*). The instruction of the trial court in the *Debs* case on the question of specific intent was singled out for special commendation by Mr. Justice Holmes in a passage quoted in petitioner's brief (p. 59). His opinion states (249 U. S. at 216):

> We should add that the jury were most carefully instructed that they could not

> find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind.[3]

In addition to the charge upon specific intent, the court in the present case, as has been noted, instructed the jury that the words used must create a clear and present danger that they will bring about the effect that Congress has a right to prevent. In so charging, he explained to the jury that he was using "the language that was used by Justice Oliver Wendell Holmes." This attribution of the language of the instruction could not have failed to give it particular impressiveness. Indeed, counsel for petitioner stated, "I might say, I was pleased with the explanation or the expression about Judge Holmes" (R. 96).

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[3] In the *Abrams* case, on the other hand, the charge with respect to intent referred only in passing to the critical element required by the statutory provision of the 1918 Act there involved, "to cripple or hinder the United States in the prosecution of the war." The instruction did not distinguish between such an intention and one simply to curtail production of things necessary to the prosecution of the war. Moreover, the trial court in that case discussed intention even more broadly, saying: "It is perhaps not amiss for me to say that men who are actuated by pure and lawful motives as a rule act in the open daylight. People who have circulars to distribute, and they intend no wrong, go up and down the streets circulating them." (Record in No. 316, 1919 Term, pp. 237–238.) See Chafee, *Free Speech in the United States* (1941 ed.) 125–126.

Petitioner appears to contend (Br., pp. 35–38) that the documents must show on their face a specific intent to bring about the evils condemned by the statute. It has never been thought, of course, that the circumstances under which the documents were distributed are irrelevant on the issue of intent; and this is apparently conceded by petitioner. No request was made that the court limit the jury to a consideration of the documents themselves, and such a request would plainly have been erroneous. Indeed, in the last war it was insisted by Judge Amidon, who was well known for his scrupulous protection of the rights of defendants under the Espionage Act, that the indictment itself must set forth the circumstances under which the utterances were made. *United States* v. *Schutte*, 252 Fed. 212 (D. N. D.). It was, to be sure, thought at one time by Judge Learned Hand that as a matter of statutory construction, though not of constitutional law, the utterances must on their face constitute advocacy of the results prohibited by the statute. *Masses Publishing Company* v. *Patten*, 244 Fed. 535 (S. D. N. Y.). That view was, however, rejected on appeal (246 Fed. 24 (C. C. A. 2)). The circuit court of appeals there quoted with approval the observation of Judge Hough, in rejecting the contention that the defendant must have by direct words advocated or

urged what the statute forbids persons to attempt to cause (245 Fed. 102, 105–106):

> The Postmaster General had found as a fact (inter alia) that the "Masses" sought to promote a mutinous, disloyal, and insubordinate spirit among troops; I think the District Court did not disagree as to that. But it was held that, because the plaintiff stopped short of urging resistance, the law was not violated. The questions presented, or some of them, are: (1) Is such view of the law correct? * * *
>
> * * * * *
>
> As to the first query, it is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. Oratio obliqua has always been preferred by rhetoricians to oratio recta; the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction "Go thou and do likewise." At all events, it is a point plainly suitable for the attention of an appellate court.

Subsequently, Judge Hand recognized that the view which he originally took was not elsewhere accepted. In *United States* v. *Eastman*, 252 Fed. 232, 233 (S. D. N. Y.), he said: "The principle now established, and for that matter recognized elsewhere in the District Courts, depends upon the likelihood of the words to produce the result, coupled with the specific intent." And in *United*

States v. *Nearing*, 252 Fed. 223, 228 (S. D. N. Y.), he said, "In short, the test was made, not objective only, but in part subjective, as is indeed often the case in the definition of crime." Thereafter the opinion of Mr. Justice Holmes in the *Schenck* case settled the point. In *Pierce* v. *United States*, 252 U. S. 239, 272, Mr. Justice Brandeis, dissenting, observed as a weakness in the Government's case that no evidence of intent was introduced save as it was found in the leaflet itself. Certain of the decisions of this Court have indeed upheld convictions without insistence upon a showing of specific intent. *Pierce* v. *United States, supra; Abrams* v. *United States*, 250 U. S. 616; cf. *Schaefer* v. *United States*, 251 U. S. 466. But in the present case the trial court refrained from following those decisions and instead fashioned its instructions to accord with the principles laid down by Mr. Justice Holmes.

On the whole case, the charge to the jury was notably fair to the defendants. The jury was admonished at some length that individuals are entitled to express opinions which may be "hateful to other people", and that violent anti-Semitism or dislike of the President of the United States is not a ground of criminality (R. 90). The jury was told that the question was whether the expression of opinions would likely have the effect of interfering with recruiting or enlistment or would cause insubordination in the Army.

"Now, the two things must concur, and it must appear that the publication was calculated to have that effect, and that the defendant intended it to have that effect" (R. 90–91). The importance of a dispassionate and discriminating charge, such as here given, would be difficult to overstate.[4]

II

The evidence was sufficient to sustain the conviction for attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces

Counts two, four, and six of the indictment charge an attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States. Each of these counts charges, as the means employed, the preparation and dissemination of a writing among persons then members of the military and naval forces of the United States. Count two refers to the document entitled "The British: An Inferior Breed" (R. 4), set forth in full in Count one (R. 2–3) and in the proof (R. 49–50). Count four refers to the document entitled "The Jew Makes a Sacrifice; The Forthcoming Collapse of America" (R. 9), set forth in full in Count three (R. 6–8) and in the proof (R. 50–52). Count six refers to the document entitled in the proof "The Diseased Spinal Cord," set forth in part in Count

[4] Compare the examples given in Chafee, *Free Speech in the United States* (1941 ed.) 74–79.

five and fully in the proof (R. 10, 11, 52–54). It is submitted that the evidence sustains the convictions on Counts two, four, and six, any one of which would be sufficient to support the judgment and sentence on appeal.

Since there is no dispute over the fact that petitioner composed and distributed the articles, the essential issues resolved by the jury and both courts below in the Government's favor relate to the elements of specific intent and clear and present danger of the evils condemned by the statute.

1. *Specific intent.*—The evidence of petitioner's intent rests on the articles themselves and the circumstances of their distribution, supplemented by his pretrial statement, his testimony, and certain similar articles previously composed by him. The three articles forming the basis of the indictment should, of course, be read in their entirety and not in fragments (see Brandeis, J., dissenting in *Schaefer* v. *United States*, 251 U. S. 466–483). They have been printed in the Statement, supra, at pp. 6–14. Each of them builds up to a climax at the close, and we here reproduce only the concluding passage of each:

> *Why was Pearl Harbor evidence of justice?*
>
> While trying to save a yellow race in the Atlantic we were hit a deadly blow by a yellow race in the Pacific. Like a cow

hit on the head by a hammer when led to slaughter, we now follow "our leader" as he moves forward on a sick spine to war.

* * * * *

Are you not weary of the observation that the international parasite survives to see nations come and go? Distinguish then you must between white and yellow races or accept the slaughter of your sons by internal revolution of [or] war abroad. Crush my enemies he screams! But there can be no further appeasement of his blood lust: no peace until the slaughter he brings to others returns upon himself. He must be eliminated as an active element in the community.

* * * * *

America was betrayed. The butchery, misery and death they would take to Germany must now, if necessary, be returned upon ourselves by:

A stench from rotting carcasses of those who would again invade Europe;

Starvation for millions of British who thought they could starve others;

Dissolution from an internal war of race against race;

Occupation by foreign troops until we are able to stand alone; and at last

The appointment of a bedside cabinet to investigate the condition of (Rosenfeld) our leader.

These pamphlets, to paraphrase them in the mildest terms, depict the war as a gross betrayal

of America, denounce our allies as degenerates, and assail the integrity of the commander in chief. Further, they call for an abandonment of our allies and a conversion of the war into a racial conflict, in which the British are regarded as a "yellow race" (R. 49, 50); they urge, further, an "internal war of race against race" and "occupation by foreign troops until we are able to stand alone" (R. 54). If it be thought that the concluding portion of the third article is not to be taken as hortatory, despite the words "must now, if necessary, be returned upon ourselves," the passage may be compared with the conclusion of an earlier article voicing unmistakably a similar incitement (R. 63):

> Men and women, who believe in decency, rise in protest at our bestiality. If necessary let the protest be long silent, implacable, until America is torn into parts by internal revolution, as retribution for a concealed sadism of which the Jew is a spokesman.

These pamphlets were mailed to persons of petitioner's own choosing; it is undisputed that he compiled his own mailing lists and mailed the documents himself. Among those whom the proof shows to have been so addressed are General Arnold, Commanding General of the Army Air Forces, who received and read the first two pamphlets (R. 17–18), Colonel Hastings of the Military Intelligence Division, stationed at San An-

tonio, Texas, who received and read the first two pamphlets (R. 18), and the editors of the Infantry Journal, a service publication, who received the three pamphlets, which were read by Lt. Col. Greene and Major Ulmer (R. 17). The three pamphlets were also received by the Air Line Pilots Association (R. 20) and the Commander of the Illinois Department of the American Legion (R. 20). Moreover, there was found in Hartzel's home, secreted under a bathtub, a paper bag containing 188 envelopes, together with three copies of the first two pamphlets (R. 21–22; Gov. Exh. 41, R. 31). Each envelope bore the name and address of an individual or organization, apparently typewritten by the petitioner himself (R. 34–35). The addressees included General George C. Marshall, Major General Henry H. Arnold, Major General William Bryden, General I. J. Philipson, General F. B. Wilby, Brigadier Generals A. E. Brown, J. T. McNarney, L. T. Gerow, R. A. Wheeler, H. L. Twaddle, and Sherman Miles, Colonel Charles A. Lindbergh, Capt. Edward Rickenbacker, the Army and Navy Union, General F. E. Uhl, General Daniel Van Voorhis, General H. C. Pratt, Major A. G. Williams, and Lt. Gen. William S. Knudsen. It is true that the majority of those on petitioner's mailing list and of the addressees of the envelopes were not members of the armed forces; they included labor unions, fraternities, educators, and other persons.

It is submitted, however, that utterances which are intended to cause disloyalty when disseminated generally, are intended to cause disloyalty in the military forces when deliberately and specifically addressed to military personnel. As was said by Mr. Justice Holmes in the *Schenck* case, 249 U. S. at 51, "Of course the document would not have been sent unless it had been intended to have some effect * * *." When sent to officers in the army, sworn to prosecute the war, inflammatory pamphlets representing that they had been betrayed, urging the destruction of their allies, and counselling them to turn the war into one between races, were intended to produce, if possible, disloyalty and refusal of duty. So the jury found.

We consider next whether this finding was precluded or supported by other evidence. Petitioner's signed statement to Government officers (R. 54–60), after describing his background and methods of work, concluded with the following explanation of his purposes (R. 60):

> Finally, the prime motive which impelled me in writing and distributi. g the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races.

This statement is not inconsistent with, but indeed reinforces, the conclusion regarding petitioner's intent drawn by the jury, when taken with the circumstances of distribution to members of the armed forces. Petitioner's failure, in enumerating the sources of his mailing list, to mention military personnel (R. 59) can fairly be regarded as a studied omission in his statement, for at about the time of making the statement he was enlisting the aid of a fellow-prisoner in an endeavor to secure the destruction of the mailing list disclosed by the envelopes secreted at his home, which he described as containing the names of 25 members of the armed forces (R. 28). It was this disclosure to a fellow-prisoner that led to the discovery of the bag and its contents (R. 21–22).

Additional evidence is found in petitioner's testimony at the trial. On direct examination he made a general denial of intent to do what the statute denounces (R. 81–82). He added, "I have been in the service myself, and I thought it might improve their morale, or indirectly that of the public at large" (R. 81). This statement, hardly credible on its face, was retracted on cross-examination (R. 85). On further direct examination, upon being asked to state his intention in writing and distributing the articles, he said (R. 82–83):

> I always regard my work as from a statistical standpoint and business, and also taking the war aspect, I thought there was a trend toward Communism, and I thought it was quite a dangerous position because of warfare between the white races, it would be the cause of war between the white and yellow races, and rather than have it beat into us, we might as well face the facts and know what we are facing, a certain group of Communists discussing methods, their viewpoints, I wanted to help minimize that so we could again have public standpoint established in this country. I am not in here because I was disloyal, and I have no prison record, but because the Communistic question is beginning to get in here and will cause the disappearance of this court, and the absorption of the executive branches otherwise of the government, the disappearance of the things that I was trying to work toward.

The ready reference to "the Communistic question" as a political matter is scarcely reflected by the documents themselves, which make an appeal for action of a military character. On cross-examination, petitioner stated: "I think the effect on the troops of saying that America was betrayed would be for them to consider whether it was or not and if so, to fight for Americans" (R. 85). In the idiom of petitioner, to fight "for Americans" necessarily meant to fight against some of

their fellow countrymen and their comrades in arms.

There were also received in evidence several pamphlets written and circulated by petitioner before our entry into the war (R. 61–75, 56–57, 91–92). These are of the same tenor as those prepared and circulated thereafter. The trial court carefully instructed the jury that it was not an offense under the statute to publish such matter before we were at war, for any purpose, and that those documents were to be considered only on the issue of petitioner's intent in publishing the later documents. The evidence was clearly admissible for that purpose.[5] There was no occasion to exclude it on the ground that it might be unduly prejudicial, since it was by no means more unbridled in tone than the three pamphlets composed and circulated after the nation was at war.

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[5] *Williamson* v. *United States*, 207 U. S. 425; *Allis* v. *United States*, 155 U. S. 117, 119; *Wood* v. *United States*, 16 Pet. 341, 360–361; *Viereck* v. *United States*, 130 F. (2d) 945, 959–960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley*, 132 F. (2d) 170, 180–181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States*, 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Howenstine* v. *United States*, 263 Fed. 1, 5–6 (C. C. A. 9); *Stenzel* v. *United States*, 261 Fed. 161, 162 (C. C. A. 8); *Shidler* v. *United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman* v. *United States*, 257 Fed. 601, 603–604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States*, 256 Fed. 805, 811–812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States*, 255 Fed. 301, 304–305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.

Whatever may have been petitioner's psychological compulsions, the evidence warrants the finding that he intended to cause disloyalty and refusal of duty in the military forces. This is sufficient "although there may be some deeper motive behind." Holmes, J., in *Abrams* v. *United States*, 250 U. S. at 627.

In the present case there was no showing of a more dominant intention, such as an endeavor to win converts to a political or economic doctrine. Compare the dissenting opinions in *Pierce* v. *United States*, 252 U. S. 239, and *Schaefer* v. *United States*, 251 U. S. 466. Judge Holly, in denying petitioner's motion for a new trial, observed (R. 106):

> * * * Counsel say the evidence does not show that intent. I cannot agree. All of the circumstances of the case, it seems to me, the very language of the pamphlets composed and distributed by Hartzell show such intent. For what purpose other than hindering the carrying on of the war in any way did he have or could he have had in mind? He appeared on the stand to be an unusually shrewd person. The story he tells of his education and his activities indicate that whatever he does is deliberate and with a definite purpose. He is not a fanatic attached to a cause, having political and economic theories for the liberation of oppressed peoples as were the defendants in *Pierce* v. *United States*,

> 252 U. S. 239, and *Abrams* v. *United States,* 250 U. S. 616, where Justices Holmes and Brandeis in dissenting opinions found that the literature distributed by the defendants had as its purpose propagating certain economic ideas rather than interfering with enlistment or recruiting or insubordination or disloyalty to the army. * * *

The present case stands in contrast to a number of prosecutions growing out of the last war which in the judgment of time, and indeed of appellate courts, are seen to have been ill-founded. This is not a case of prosecution for a casual, unpatriotic utterance (cf. *Von Bank* v. *United States,* 253 Fed. 641 (C. C. A. 8); *Erhardt* v. *United States,* 268 Fed. 326 (C. C. A. 7)), or a casual disparaging statement (cf. *Mead* v. *United States,* 257 Fed. 639 (C. C. A. 9)). It is not simply a case of a gloomy forecast concerning the war (cf. *Grubl* v. *United States,* 264 Fed. 44 (C. C. A. 8)), or a protest at a particular item in the Government's war program, such as the treatment of conscientious objectors (cf. *United States* v. *Steene,* 263 Fed. 130 (N. D. N. Y.), reversed on confession of error, 255 U. S. 580). This is a case of deliberate, well-planned, and persistent endeavor extending over a substantial period of time. Hundreds of leaflets were sent to selected individuals. They were obviously meant to have a cumulative effect on the recipients. There can

be no doubt that they were intended to break down the will to carry on the war.

The present case, finally, is not simply that of intemperate criticism of the war, its strategy, or its purposes. "We do not lose our right to condemn either measures or men because the Country is at war." *Frohwerk* v. *United States,* 249 U. S. 204, 208. Utterances are not sought to be punished merely because they may have the effect of causing discontent among the people, including the armed forces.[6] But when they are ad-

[6] The language of the statute was designed to avoid making criminal all utterances which might produce such discontent. See the statement of Congressman Webb, 55 Cong. Rec. 1594:

> As originally drawn that section prohibited the attempt to cause disaffection in the armed forces. The committee did not like the word "disaffection." It was too broad and too elastic and too indefinite. Therefore in order to make it more clearly understood we struck the word "disaffection" from the bill and inserted in lieu thereof the words "insubordination, disloyalty, or refusal of duty," and we think the House will agree with us that the amendment was a good one. We felt that to make it a crime to create disaffection in a soldier's breast might ofttimes subject a perfectly innocent person to punishment. A mother might write to a boy and tell him the sad conditions back home. That would create disaffection and discontent in the boy's breast. It would not create or attempt to create disloyalty to his flag, insubordination to authority, or refusal to perform duty, and so we have made that section so that it will protect an honest man, and we feel that it will get the dishonest fellow who deliberately undertakes to spread disloyalty, insubordination, or refusal to perform duty in our armed forces.

dressed to members of the armed forces and intended to cause military personnel to renounce their obligation, to treat associates in arms as military enemies, and to turn the war against the latter, the permissible bounds have been crossed. Such utterances are not, any more than were those in the *Schenck* case, "within the scope of that right to criticise either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority". L. Hand, J., in *Masses Pub. Co.* v. *Patten,* 244 Fed. 535, 539 (S. D. N. Y.).

2. *Clear and present danger.* The jury found that the petitioner's acts during time of war constituted a clear and present danger of causing disloyalty, refusal of duty, or insubordination in the armed forces. As Mr. Justice Brandeis observed in *Schaefer* v. *United States,* 251 U. S. 466, 483, "because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one", though the duty rests on the courts to withdraw the case from the jury if "men, judging in calmness, could not reasonably say that [the words] created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent". We submit that the trial court properly left the issue to the jury.

Before considering the evidence on this issue, it may be helpful to observe that in the present case the elements entering into the statutory offense of an attempt include in substance those to which Mr. Justice Holmes gave prominence in formulating, as a constitutional test, the clear and present danger rule. The cases arising out of the first world war under the Espionage Act were virtually all cases of conspiracies.[7] That charge required, of course, only an unlawful plan and an overt act in furtherance of it. The statute marked out no point in advance of which utterances might be regarded as too remote to constitute an offense, particularly in view of the privilege of free speech. The test formulated by Mr. Justice Holmes was quite evidently based on the distinction which he had already drawn in the criminal law between conspiracy and attempt. See, e. g., *Hyde* v. *United States*, 225 U. S. 347, 384–391. His analysis of attempts emphasized, as interrelated elements, a specific intent, proximity to success, and the seriousness of the crime denounced. In the *Hyde* case, his dissenting opinion pointed out that a criminal attempt required that "there must be dangerous proximity to success" (p. 388). Again, speaking of an

[7] *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466; *Pierce* v. *United States*, 252 U. S. 239. In *Debs* v. *United States*, 249 U. S. 211, no conspiracy was involved.

attempt, he pointed out that it may be punished "where it is so near to the result that if coupled with an intent to produce that result, the danger is very great." In *Swift & Co.* v. *United States,* 196 U. S. 375, 396, he had adumbrated the view that specific intent is important not merely from a moral standpoint but from a practical standpoint as well, since "where acts * * * require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen." Not only the specific intent, and the proximity to success, but the nature of the evil to be avoided, was important in marking the definition of an attempt. In *Commonwealth* v. *Peaslee,* 177 Mass. 267, 272, he had said: "As was observed in a recent case, the degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite."

Faced with the necessity of adjusting the permissible bounds of the law of conspiracy to the constitutional privilege of free speech, it was natural that Mr. Justice Holmes should have drawn on his analysis of the law of attempts. In the *Abrams* case the relation between the clear and present danger test and the elements of an attempt was made explicit in Mr. Justice Holmes' dissent (250 U. S. at 628): "Now nobody can

suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable."[8]

Petitioner's intent has, we believe, been established by the verdict and the evidence. The last act required on his part, the placing of the leaflets in the hands of the addressees, was completed. The danger apprehended by Congress was of the most critical kind. In a war for national survival,

[8] See also the letter of Holmes to Pollock, on the subject of the *Abrams* case: "I think it possible that I was wrong in thinking that there was no evidence on the Fourth Count in consequence of my attention being absorbed by the two leaflets that were set forth. But I still am of opinion that I was right, if I am right in what I devoutly believe, that an actual intent to hinder the U. S. in its war *with* Germany must be proved. As the *Debs case* and two others were assigned to me, in which the convictions were upheld, I thought it proper to state what I thought the limits of the doctrine. The general principles laid down by me I think correct, and the particular conclusion I adhere to, because even if there were evidence of a conspiracy to obstruct, etc., the overt act laid must be an act done to effect the object of the conspiracy and it seems to me plain that the only object of the leaflets was to hinder our interference with Russia. I ought to have developed this in the opinion. But that is ancient history now." 2 Holmes-Pollock Letters, p. 32.

the defection of military personnel is a matter of grave concern, as reflected in the severity of the military offense involved. Implicit in the Espionage Act of 1917 is the legislative judgment that it is necessary and desirable, in the prosecution of a war, to protect our fighting men from utterances designed to subvert them from their sworn duty. Unlike the order in *Bridges* v. *California*, 314 U. S. 252, 261, the determination that members of the armed forces should be insulated from utterances intended to cause insubordination and disloyalty comes before the Court "encased in the armor wrought by prior legislative deliberation".[9]

Petitioner chose to reach officers of relatively high rank. If the likelihood of success was less in that case, the stakes of success were clearly higher, and the resulting peril greater. Can it be said that the possibility of subverting the addressees from their duty was so preposterous that no attempt was committed? The question, it should be noted, does not turn on the incorruptibility of the particular persons addressed. The very concept of an attempt presupposes failure. In other fields of the criminal law, the moral or physical strength of the intended victims does not relieve a defendant of responsibility for an attempt upon them. Thus, with respect to attempts

[9] The *Bridges* case differs significantly from this case, of course, in other respects as well; that case involved no question of military personnel in time of war, or even of threatening utterances specifically addressed to a judge.

to bribe a judge, Coke said: "But admit the party offereth a bribe to the judge meaning to corrupt him in the cause depending before him, and the judge taketh it not, yet this is an offense punishable by law in the party that doth offer it." [10] Likewise, an effort to poison another is none the less a criminal attempt because the dosage is too small for the purpose.[11] And it would hardly be suggested that, in a situation perhaps more comparable to that here presented, a criminal attempt has not been committed where the quantity of poison administered is so large that it is detected and rejected by the intended victim. In view of the size and character of our armed forces, drawn from all segments of our population and with diversified backgrounds and propensities, can it be said that the success of an endeavor to sway them from their path of duty by the means which petitioner employed is merely fanciful, like an attempt to kill by witchcraft, which "is really no attempt at all to kill"? [12]

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[10] Coke, Third Institute 147, quoted in Sayre, Criminal Attempts, 41 Harv. L. Rev. 833, n. 47.

[11] See Holmes, J., in *Commonwealth* v. *Kennedy*, 170 Mass. 18, 22. See also J. Hall, *Criminal Attempt*, 49 Yale L. J. 835, n. 185: "There are occasional decisions holding that if the substance administered was not poisonous at all, though the defendant believed so, there was no criminal intent. These are early decisions that hark back to the era when unsuccessful pickpockets were held not guilty."

[12] Pollock, C. B., in *Attorney General* v. *Sillem*, 2 H. & C. 431, 525, quoted in Beale, *Criminal Attempts*, 16 Harv. L. Rev. 496, n. 1.

So to conclude would be, it is submitted, to ignore much of what recent history teaches of the power of outrageous speech, when intensified by constant repetition and a calculating design, to move to action. "Psychological warfare" has become as familiar as it has been proved effective. That which has been employed in Europe to instill fanatical hatreds in masses of the people can hardly be held by a court to be patently incapable of achieving results. It may fairly be asked whether material of the sort here involved, if it were changed to substitute enemy leaders and enemy objectives for our own, and were circulated in similar quarters in an enemy country, could not be thought to have a genuine chance of weakening the military will. Much of the effort of the belligerents in psychological warfare must be put down as mere fantasy if material of this sort is incapable of causing disloyalty or refusal of duty.[13]

Nor can we ignore the military situation when the pamphlets were distributed, in the summer of 1942. The fortunes of the war were at that time grimly unfavorable to the United Na-

[13] Cf. Hearings before Subcommittee No. 4 of House Judiciary Committee, 77th Cong., 1st sess., on H. R. 6045 (Foreign Agents Registration Act), 12–14, 21–23 (Statement of Chief of Special Defense Unit, Department of Justice); National Research Council, *Psychology For the Fighting Man* (1943), 16–18, 330, 430–447; Farago, *German Psychological Warfare* (1941); Childs and Whitton, eds., *Propaganda by Short Wave* (1942), 51–108, 263–301; Rolo, *Radio Goes To War* (1940), 94–126.

tions. The peril of a Japanese invasion of Australia was very real. The Allied forces were pushed back from New Guinea to the borders of India. The Burma Road, the supply line to China, was cut. In Russia the Caucasian oil fields were threatened and Leningrad was surrounded. In Africa the enemy was only seventy-five miles from the Suez canal. In June, 1942, 111 vessels of the United Nations were sunk. It was in these circumstances that petitioner sought to arouse members of the armed forces to act on the conclusion that the war was a gross betrayal of this country and that it should be abandoned in favor of a racial conflict. Here, as in *Frohwerk* v. *United States*, 249 U. S. 204, 209, "we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame * * *."

The clear and present danger test is a "rule of reason" which "can be applied correctly only by the exercise of good judgment" Brandeis, J., dissenting, in *Schaefer* v. *United States*, 251 U. S. 466, 482–483. "Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities." *Ibid.* Even in time of war suppression must be viewed with concern, for the need of discussion and debate persists, in the interest of wise de-

cisions. But all would agree that there are occasions during war when the "rule of reason" may serve to preclude some forms of utterance, as, for example, a speech denouncing the war made to troops on the eve of battle. Utterances made to members of the armed forces for the very purpose of weakening their loyalty may, it is submitted, be treated in the same way, without sacrificing the acknowledged value of freedom of speech.

Ordinarily it would be preferable, and mandatory, to act upon the injunction that "the fitting remedy for evil counsels is good ones." Brandeis, J., in *Whitney* v. *California,* 274 U. S. 357, 375. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Id.* at 377. The same Justice said, in *Gilbert* v. *Minnesota,* 254 U. S. 325, 336, 338 (dissenting): "As an incident of its power to declare war it may, when the public safety demands, require from every citizen full support, and may, to avert a clear and present danger, prohibit interference by persuasion with the giving of such support. * * * There are times when those charged with the responsibility of Government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative; because the emergency does not permit reliance upon the

slower conquest of error by truth. And in such emergencies the power to suppress exists."[14] Here we have both such an emergency and action having a criminal purpose, as the jury found. In that context, Congress is entitled to choose the remedy of the criminal law rather than the open forum. Were this not so, the nation's power of self-protection and of protection of its armed

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[14] In *Gilbert* v. *Minnesota*, the power of Congress to raise and support an army, under which the Espionage Act of 1917 was passed, was thought by Mr. Justice Brandeis to preclude the state legislation there involved. In the later case of *Near* v. *Minnesota*, 283 U. S. 697, there was not even an ostensible relation to the war powers, and the statute, suppressing defamatory political publications, was held an interference with liberty of the press. The statute resembled the Sedition Act of 1798. The difference between such acts and that here involved was recognized by the opponents of the 1798 law. John Nicholas of Virginia, who was the chief spokesman in Congress for the repeal of the Sedition Act, said (9 Annals of Congress, p. 3010):

> I have seen somewhere, and I beg leave here to remark on it, the authority of the Convention who formed the Constitution of Virginia, quoted to justify this construction. That Convention is said to have passed a law similar to the law of Congress, after having provided for the liberty of the press in their bill of rights. Let us examine that law. The first section is to punish those who shall "by any word, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power of the King, or Parliament of Great Britain, heretofore claimed over this Colony, or shall attribute any such authority," &c. This section, passed at the beginning of the most awful contest in which ever man was engaged, a contest for the right of self-government against one of the most powerful nations in the world, was to estab-

forces would have to depend upon a judgment of the courts that such measures must await a time when the country is more clearly *in extremis.*[15]

III

The evidence was sufficient to sustain the conviction for obstructing the recruiting and enlistment service

If it becomes necessary to consider counts one, three, and five, charging willful obstruction of the recruiting and enlistment service, it is submitted that the evidence likewise sustains the conviction for this offense. Two elements in the definition of the offense will first be discussed.

The meaning of the phrase "recruiting and enlistment service" includes more than voluntary

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lish what? Not the inviolability of the Governor of the State, nor of the majority of either House of the Legislature, but to punish men who should promote resistance to the right of the people to govern themselves, to the principle of the Constitution, to the republican principle. So different is this from the object of the law of Congress, that it would have been impossible to believe that they should have been compared, if we had not seen it done.

The difference is epitomized in the fact that while the 1917 Act is operative only in time of war, the 1798 Act by its terms expired with the close of the incumbent political administration, on March 3, 1801.

[15] The words of R. L. Stevenson, in another context, are apt: "This is no cabinet science, in which things are tested to a scruple; we theorize with a pistol to our head; we are confronted with a new set of conditions on which we have not only to pass judgment, but to take action, before the hour is at an end."—Quoted in Lazarsfeld and Merton, Studies in Radio and Film Propaganda, Trans. N. Y. Acad. Sci., Ser. II, Vol. 6, No. 2, p. 59 (Dec. 1943).

enlistments. It includes the draft as well. This was established in *Schenck* v. *United States,* 249 U. S. 47, 53, the Court holding that the term "recruiting" meant "gaining fresh supplies for the forces, as well by draft as otherwise." This meaning has not been questioned by Congress or the courts, and is apparently accepted by petitioner.

The meaning of "obstruction" appears, however, to be brought in issue by petitioner. An argument is made (Brief, 31–32) to the effect that, to support the charge of wilfully obstructing the recruiting or enlistment service, the accomplishment of that end must be shown. It is not clear whether petitioner argues that an actual decline in recruiting or an actual preventing of persons from reporting for duty must be proved. No such instruction was requested in the trial court. It is established that no such proof is necessary. In one of the early cases under the statute, *Masses Publishing Company* v. *Patten,* 244 Fed 535 (S. D. N. Y.), Judge Learned Hand observed, "I am not prepared to assent to the plaintiff's position that this only refers to acts other than words, nor that the act thus defined must be shown to have been successful. One may obstruct without preventing, and the mere obstruction is an injury to the service; for it throws impediments in its way" (p. 541). The same construction was given the provision in

O'Hare v. *United States,* 253 Fed. 538, 540 (C. C. A. 8), certiorari denied, 249 U. S. 598, and *Rhuberg* v. *United States,* 255 Fed. 865 (C. C. A. 9). The *Masses* case was reversed by the Circuit Court of Appeals for the Second Circuit on the ground that Judge Hand gave an unduly narrow construction to the statute in requiring that the words used must in themselves advocate obstruction, insubordination, and the like; but on the issue here involved, the meaning of obstruction, the decision was approved. *Masses Publishing Company* v. *Patten,* 246 Fed. 24, 38. In recent cases the provision has been given the same interpretation. *United States* v. *Pelley,* 132 F. (2d) 170, 178 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Butler* v. *United States,* 138 F. (2d) 977, 980 (C. C. A. 7). It is true that a few lower courts originally held that the absence of the word "attempt" from this portion of the statute required proof of actual prevention of enlistment or actual refusal to report for induction. E. g., *United States* v. *Hall,* 248 Fed. 150 (D. Mont.). For that reason, in response to a request by the Attorney General (see Report of the Attorney General, 1918, p. 18) Congress included in the 1918 amendment of the Act a clause expressly making an attempt to obstruct the recruiting and enlistment service a crime. Act of May 16, 1918, 40 Stat. 553. The sponsors of the bill, however, declared that in so doing they were not giving legislative sanction to the decisions which had constructed

the Act narrowly. See 56 Cong. Rec. 4561.[16] Consequently, the repeal in 1921 (41 Stat. 1360) of the 1918 amendment, which had added a large number of other provisions beyond those requested by the Attorney General, cannot be taken as limiting the meaning of the provision as found in the 1917 Act.[17]

In considering the evidence, it is necessary to distinguish between agitation for political change and a purpose to obstruct the recruiting and enlistment service. Criticism of the conduct of the war, which might have a tendency to affect ad-

[16] Explaining the genesis of the 1918 amendment, J. L. O'Brian said: "The Attorney General * * * requested also that the last clause of the section be clarified by including specifically 'attempts' to obstruct the recruiting and enlistment service." Report of New York State Bar Association, 1919, 302.

[17] Each count of the indictment here involved included an allegation of "injury of the Service of the United States" (R. 4, 8, 11). It is doubtful whether such an allegation is necessary to charge an offense under this section of the statute. (See *United States* v. *Pierce*, 245 Fed. 878 (N. D. N. Y.), affirmed in *Pierce* v. *United States*, 252 U. S. 239). The phrase did not appear in the House bill (H. R. 291, 65th Cong., 1st Sess.) which was the basis of the enacted statute (see H. Rep. No. 30, 65th Cong., 1st Sess., Sec. 5). It did appear in a similar bill introduced in the Senate (S. 2) to which was added the clause punishing obstruction of the recruiting and enlistment service (see 55 Cong. Rec. 871). It seems likely, therefore, that when the clause punishing the obstruction of the recruiting service was added to the House bill (see H. Rep. No. 69, 65th Cong., 1st Sess.) the phrase "to the injury of the service" was intended to apply only to that clause. This construction is supported by the fact that the phrase would be without meaning when applied to the first part of the statute punishing false statements. The question,

versely the willingness of men to serve in the armed forces, is not thereby rendered criminal. It is submitted that petitioner's activities support the jury's determination that the requisite intent under the statute was established. The whole tenor of petitioner's pamphlets was a highly emotional and scurrilous attack upon our position in the war, together with praise of Germany and extenuation of Japan. The entry of the United States into the war produced no apparent change in petitioner's publications. They are not directed at questions of military strategy or military competence, nor do they reflect an endeavor to further some more comprehensive social program, in which the war might be only an incident of discussion.

The argument that the petitioner was engaged merely in political pamphleteering and that accordingly his mailing list was composed of "representative prominent people" (R. 79–80) is not wholly consistent with the character of the addressees whom he sought to reach. The selection of organizations such as the Airline Pilots' Asso-

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although raised by petitioner (Br. 48) is immaterial here, since there can be no question that an attempt to undermine the morale of high ranking officers would constitute an injury to the service. Nor is injury to the service a separate element of proof under the clause relating to recruiting and enlistment. *Cf.* L. Hand, J., in *Masses Pub. Co.* v. *Patten*, 244 Fed. 535, 541: "One may obstruct without preventing, and the mere obstruction is an injury to the service; for it throws impediments in its way."

ciation, the American Legion, fraternities and labor unions (R. 20, 59), suggests an attempt to reach organizations of men of military age. In any event, petitioner admitted in his testimony that he thought the country at large and the troops ought to consider the consequences of war; and that the effect on the troops of saying that America had been betrayed would be to have them consider whether, if so, they should "fight for Americans" (R. 85). It is a fair interpretation of this testimony that he intended his publications to have the same effect on the public at large. This purpose was a purpose to weaken the will to join the armed forces. The sending of the pamphlets to men subject to military service, with such a purpose, was an offense under the statute. Cf. *Debs* v. *United States*, 249 U. S. 211. The third pamphlet is particularly significant in this respect. Counseling the destruction of those who would again invade Europe, and the occupation of the United States by foreign troops if necessary, is the advocacy of methods of terminating the war which are incompatible with voluntary enlistment or with the orderly process of the draft.

In prohibiting willful endeavor of this sort, Congress was mindful of the fact that under a regime of compulsory military service in time of war, men subject to such service need not be exposed to the competing urgings of those who would have them aid in carrying on the war and those who

would not. As was pointed out by Mr. Justice Brandeis, dissenting, in *Gilbert* v. *Minnesota*, 254 U. S. 325, 339–340, except for the conscription law of 1863, our law prior to the World War "left an American as free to advise his fellows not to enter the Army or the Navy as he was free to recommend their enlistment". But, as the opinion proceeds to point out, our national policy in that regard was changed in 1917 under the impact of the war. It is submitted that petitioner was properly found, on the basis of his course of activity and his testimony, to have placed impediments in the way of gathering forces for the armed services, and to have done so with that intention.

CONCLUSION

The affirmance of the conviction on any one count is sufficient to sustain the judgment in this case. For the reasons stated we submit that each of the first six counts may be sustained. We therefore respectfully submit that the judgment should be affirmed.

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APRIL 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 531.—October Term, 1943.

Elmer Hartzel, Petitioner,
vs.
United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 12, 1944.]

Mr. Justice Murphy announced the conclusion and judgment of the Court.

For the first time during the course of the present war we are confronted with a prosecution under the Espionage Act of 1917.[1] The narrow issue is whether there was sufficient evidence to support the jury's determination that petitioner violated the Act in that, in time of war, he willfully attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces and willfully obstructed the recruiting and enlistment service of the United States.

Petitioner and two others were charged in a seven-count indictment with violations of the second and third clauses[2] of Section 3 of the Act, together with a violation of Section 4. It was alleged that in time of war they published and disseminated three pamphlets to numerous persons and organizations, among whom were individuals available and eligible for recruitment and enlistment in the military and naval forces of the United States as well as individuals already members of the armed forces. Counts 1, 3 and 5 charged that by these actions they willfully obstructed the recruiting and enlistment service of the United States in violation of the third clause of Section 3. Counts 2, 4 and 6

[1] Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 50 U. S. C. § 31 *et seq.*

[2] The second and third clauses of Section 3 of the Act provide as follows: "Whoever, when the United States is at war, . . . shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." 40 Stat. 217, 219, 41 Stat. 1359, 50 U. S. C. § 33.

charged that these activities constituted a willful attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States in violation of the second clause of Section 3. Count 7 charged a conspiracy to violate Section 3, in violation of Section 4 of the Act. Petitioner was found guilty on all counts and was sentenced generally to five years in prison. The court below affirmed his conviction on appeal.[3] 138 F. 2d 169. The importance of the issues involved led us to grant certiorari. 320 U. S. 734.

Petitioner, an American citizen, was born 52 years ago in Pennsylvania. His ancestors, of Scotch, Irish and German descent, came to this country over 120 years ago. He enlisted in the armed forces in 1917 and served overseas. After his honorable discharge in 1919, he was employed in the city health department at Akron, Ohio, while earning a degree in science at Akron University. He then took courses in economics and political economy at the University of Chicago and became a financial analyst and statistician for various banks, investment brokers and investment companies in Chicago. After 1938 he was employed as an auditor and statistician, first by the state of Illinois and then by the federal government in corporations in Detroit and Chicago producing material for the United States Army Air Corps. During all this time he had constantly engaged in economic research on his own behalf and several articles by him were published in reputable business and financial periodicals. There was no evidence of his having been associated in any way with any foreign or subversive organization.

Prior to the entry of the United States into the present war, petitioner wrote several short articles containing scurrilous and vitriolic attacks on the English, the Jews and the President of the United States. Americans were urged not to ally themselves with the English. Only a German victory, it was said, would bring "increased stability and safety for the West." Petitioner had

3 Petitioner's co-defendants — Mecartney, an attorney, and Soller, the mimeographer — were found guilty on counts 5, 6 and 7. But the trial judge set aside Mecartney's conviction on a motion for a new trial on the ground that there was no evidence that he had any active part in the distribution of the pamphlets produced by petitioner. Soller's conviction was set aside by the court below on the ground that there was no proof that he knew what use petitioner made of the pamphlets. Mecartney and Soller were the only co-conspirators of petitioner named in the indictment and the setting aside of their convictions makes it impossible to sustain petitioner's conviction upon the basis of count 7, the conspiracy count.

certain of these articles mimeographed by various individuals in Chicago, including one Elmer Soller, who was later indicted as a co-defendant with petitioner. Several hundred copies of the mimeographed articles were mailed by petitioner to individuals and organizations appearing on his mailing list.

Petitioner then wrote three articles in 1942 which formed the basis for his conviction under the Espionage Act of 1917. These articles repeated the same themes and were marked by the same calumny and invective; they are set out at length in the opinion of the court below, 138 F. 2d at 170-172, and need not be repeated here. In substance, they depict the war as a gross betrayal of America, denounce our English allies and the Jews and assail in reckless terms the integrity and patriotism of the President of the United States. They call for an abandonment of our allies and a conversion of the war into a racial conflict. They further urge an "internal war of race against race" and "occupation [of America] by foreign troops until we are able to stand alone."

After writing these articles, petitioner had them mimeographed by his co-defendant Soller and mailed about six hundred copies of them, anonymously, to persons and organizations on his mailing list. In order to avoid detection, he deposited the envelopes in several different mail boxes and endeavored to leave no fingerprints.[4] He had compiled this mailing list from several sources: (1) the World Almanac, which gave him the names of various prominent people, associations, fraternities, sororities, etc.; (2) a government publication containing a list of labor unions; (3) daily newspapers which mentioned the names of people actively engaged in the America First Committee; and (4) telephone directories at the public library which gave him the names of various state and district commanders of the American Legion. Included

[4] Petitioner testified that "I sent the documents out anonymously because I almost lost my job several times and I knew I had to be careful and also because of a great deal of espionage in the community. I did not sign my name to the documents I sent out for the same reason. . . . I took them out and dropped them in several boxes. I did that because with such a large quantity of them, I thought someone might throw them out. I mailed them all at once, but I dropped one hundred in one box and another hundred in each of four or five boxes. I didn't put them all in one box simply because, if someone would throw one out they would throw them all out. I had a suspicion that someone in authority might well find these articles and throw them out for the reasons I gave you. I had heard that fingerprints would be identified so I put my hand over it like that (indicating). I was suspicious of it for the same reasons I gave you." There was no evidence contradicting any of this testimony.

in his list were such persons as United States senators, representatives, bishops and other church officials; such organizations as the Daughters of the American Revolution and We the Mothers Mobilize were also included.

The Government proved that two of these pamphlets were mailed to and read by the Commanding General of the United States Army Air Forces and a colonel attached to the General Staff. All three pamphlets were mailed to the United States Infantry Association, which publishes the Infantry Journal, a service publication, and were read at its headquarters by two Army officers in the course of their duties. The evidence also showed that one or more of the pamphlets were received in the mail by the president of Northwestern University, the American Newspaper Publishers Association, the Kiwanis International, the Lions International, the Air Line Pilots Association and the American Legion, Department of Illinois. Individuals registered under the Selective Training and Service Act of 1940 and employed by these various organizations read the pamphlets in the ordinary course of their work, including one 20-year old clerk whose duty it was to open the incoming mail at the office of the Lions International. In addition, envelopes addressed to at least eighteen high ranking Army officers were found secreted under a bathtub in petitioner's home, together with several of the pamphlets.

Shortly after being taken into custody, petitioner signed a statement in which he claimed that "the prime motive which impelled me in writing and distributing the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races." At the trial he testified that "I thought there was a trend toward Communism, and I thought it was quite a dangerous position because of warfare between the white races, it would be the cause of war between the white and yellow races and rather than have it beat into us, we might as well face the facts and know what we are facing, a certain group of Communists discussing methods, their viewpoints. I wanted to help minimize that so we could again have public standpoint established in this country." He said he thought his articles might improve the morale of persons available and eligible for recruiting and enlistment in the armed forces, though he retracted

this statement on cross-examination. His efforts, he thought, "were political in character" and "the effect on the troops of saying that America was betrayed would be for them to consider whether it was or not and if so, to fight for Americans."

On the basis of these facts, petitioner was found guilty of violating the second and third clauses of Section 3 of the Act. These clauses are directed at those who, in time of war, "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or who, in time of war, "willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States". Thus, these clauses punish the making and dissemination of statements and writings which are intended to have the evil effects set forth by Congress. No question is here raised as to the constitutionality of these provisions or as to the sufficiency of the indictment returned thereunder. But such legislation, being penal in nature and restricting the right to speak and write freely, must be construed narrowly and "must be taken to use its words in a strict and accurate sense." Mr. Justice Holmes, dissenting in *Abrams* v. *United States*, 250 U. S. 616 at 627.

The language of the second and third clauses of Section 3 makes clear that two major elements are necessary to constitute an offense under these clauses. The first element is a subjective one, consisting of a specific intent or evil purpose at the time of the alleged overt acts to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment service. This requirement of a specific intent springs from the statutory use of the word "willfully." That word, when applied in the context of a highly penal statute restricting freedom of expression, must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress. Cf. *United States* v. *Murdock*, 290 U. S. 389 at 394; *United States* v. *Illinois Cent. R. Co.*, 303 U. S. 239 at 242; *Braverman* v. *United States*, 317 U. S. 49 at 53; *Sacher* v. *United States*, 317 U. S. 492 at 497. The second element is an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. *Schenck* v. *United States*, 249 U. S. 47. Both elements must be proved by the Government beyond a reasonable doubt.

The requisite specific intent in such a case as this may be proved not only by the language actually used in the statements or writings themselves but also by the circumstances surrounding their preparation and dissemination. But, so far as the record in this case is concerned, neither of these sources is productive of evidence from which a jury could properly find beyond a reasonable doubt that petitioner had such an intent at the time he composed and mailed the three pamphlets. For that reason alone the conviction must be reversed.

There is nothing on the face of the three pamphlets in question to indicate that petitioner intended specifically to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces or to obstruct the recruiting and enlistment service. No direct or affirmative appeals are made to that effect and no mention is made of military personnel or of persons registered under the Selective Training and Service Act. They contain, instead, vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories and gross libels of the President. Few ideas are more odious to the majority of the American people or more destructive of national unity in time of war. But while such iniquitous doctrines may be used under certain circumstances as vehicles for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age, they cannot by themselves be taken as proof beyond a reasonable doubt that petitioner had the narrow intent requisite to a violation of this statute.

Nor do the circumstances of the distribution of the three pamphlets, supplemented by petitioner's pretrial statement, his testimony and the similar articles written and disseminated by him before the war, supply sufficient evidence of the necessary intent. There was no evidence that petitioner intended to influence military personnel or individuals of draft age in the manner forbidden by the statute in composing his mailing list or in sending his pamphlets to those listed therein. His purpose, rather, appears to have been to obtain the names of prominent individuals and organizations and to propagate his ideas among them. The fact that some of these individuals and some of the representatives of these organizations were of draft age was not shown to have been dominant, or even present, in petitioner's mind or to have motivated him in any degree. And the fact that he mailed his pamphlets to at least

four high ranking Army officers and addressed envelopes to at least eighteen others is not evidence from which the jury could infer beyond a reasonable doubt that he intended to cause insubordination, disloyalty, mutiny or refusal of duty among them. Their inclusion in a mailing list of six hundred persons and organizations is quite consistent with a mere intent to influence public opinion and to circulate malicious political propaganda among outstanding personages, whether they be in the armed forces or not.

His prewar writings, if they should be taken into account at all, are no more indicative of the necessary intent than are the three pamphlets in issue. His statements and testimony concerning his motive in preparing and distributing the three pamphlets are likewise indecisive. Proof that he intended, in his words, to "create sentiment against war amongst the white races" and to "unite the white races against what I consider to be the more dangerous enemies, the yellow races" does not satisfy the burden which rests on the Government to prove beyond a reasonable doubt that petitioner had the purpose or intent to do what is outlawed by Section 3 of this Act. Thoughtlessness, carelessness and even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime.

We are not unmindful of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal. For that reason our enemies have developed psychological warfare to a high degree in an effort to cause unrest and disloyalty. Much of this type of warfare takes the form of insidious propaganda in the manner and tenor displayed by petitioner's three pamphlets. Crude appeals to overthrow the government or to discard our arms in open mutiny are seldom made. Emphasis is laid, rather, on such matters as the futility of our war aims, the vices of our allies and the inadequacy of our leadership. But the mere fact that such ideas are enunciated by a citizen is not enough by itself to warrant a finding of a criminal intent to violate Section 3 of the Espionage Act. Unless there is sufficient evidence from which a jury could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act, an American citi-

zen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act of 1917. Such evidence was not present in this case.

The judgment of the court below is

Reversed.

Mr. Justice Roberts.

Without discussing the evidence in detail or characterizing the petitioner's conduct, I deem it sufficient to say that I concur in the view that there was not sufficient evidence in the case to warrant submission to the jury. The conviction of violation of the statute should, therefore, be reversed.

Mr. Justice Reed, with whom Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Jackson concur, dissenting.

The First Amendment to the Constitution preserves freedom of speech and of the press in war as well as in peace. The right to criticize the Government and the handling of the war is not questioned. Congress has not sought, directly or indirectly, to abridge the right of anyone to present his views on the conduct of the war or the making of the peace. The legislation under which Hartzel was tried and convicted was aimed at those who, in time of war, "shall willfully cause or attempt to cause insubordination, disloyalty, or refusal of duty, in the military or naval forces of the United States." It is only when the requisite intent to produce those results is present that criticism may cross over the line of prohibited conduct. The constitutional power of Congress so to protect the national interest is beyond question. *Schenck* v. *United States*, 249 U. S. 47.

If the petitioner committed acts from which a properly instructed jury could reasonably conclude that the requisite intention existed to cause the evils against which the statute is directed, the sufficience was proper. As the verdict was general, we need only to examine the proceedings under the count of the indictment which charged violation of the law in the words quoted in the preceding paragraph. *Hirabayashi* v. *United States*, 320 U. S. 81, 105.

Petitioner urges that these articles, which contain on their face no explicit call upon the military to disobey orders, act in a disloyal manner, mutiny or disregard their duty, cannot be a violation of the statute because they offer no proof of the necessary intent and none is offered outside of the papers themselves. We think that this argument fails. Congress has made it an offense willfully to attempt to cause insubordination and likewise willfully to obstruct the recruiting and enlistment service of the Nation. It does not commend itself to us to hold that thereby Congress was merely concerned with crude attempts to undermine the war effort but gave free play to less obvious and more skillful ways of bringing about the same mischievous results. Papers or speeches may contain incitements for the military to be insubordinate or to mutiny without a specific call upon the armed forces so to act. If circulated for the purpose of undermining military discipline, scurrilous articles, attacking an ally, a minority of our citizens and the President, may contain, without words of solicitation, indications of purpose sufficient, if accepted as true, from which to draw an intent to accomplish the unlawful results.

Moreover, when the other evidence is added to the articles themselves, we think that enough facts revealing the requisite intent were presented to justify the verdict. Other similar articles circulated prior to the declaration of war tended to show a continuing intention. The articles which were the basis of the indictment were sent to military officers including those of the highest rank. This circumstance is brought forward by petitioner as indicative of a lack of intention to undermine the military forces. This was doubtless weighed by the jury, but certainly it cannot be said that circulation of propaganda among officers shows less intention to proselyte than to circulate among the enlisted personnel. Copies were sent to the Infantry Journal, a publication circulating largely in the armed forces. Nothing appears as to any motive, other than interference with discipline, that the petitioner might have in distributing this type of pamphlet to professional military officers. The jury was entitled to weigh the fact that the articles were sent anonymously. The jury was also entitled to weigh the fact that those to whom the articles were sent were hand-picked and composed a select group. These actions speak as loud as words.

Hartzel himself, moreover, made a statement which was introduced at the trial. In it he told of the preparation of the pamph-

lets, the selection of the mailing list from among prominent personages and associations and his reason for his acts. His intent appears in these words:

> "Finally, the prime motive which impelled me in writing and distributing the articles discussed above, was the hope that they might tend to create sentiment against war amongst the white races and in diverting the war from them, to unite the white races against what I consider to be the more dangerous enemies, the yellow races."

The jury might well infer from the quoted paragraph that Hartzel, by placing these pamphlets in military hands, was attempting to cause insubordination among the troops. He sought to develop sentiment "against war among the white races." Germans are a "white race."

These pamphlets were distributed in 1942. The military situation was then nothing like so strong as now nor confidence in our strategy so uniform. A large segment of public opinion desired to concentrate against Japan, rather than Germany and Italy, a viewpoint which doubtless had advocates among the members of the armed forces. It was an opportune time from the viewpoint of the German enemy to put pamphlets such as these in circulation which taught suspicion of Britain, vilified Jews and promoted lack of confidence in the President. On the question of intention, the circumstances under which the pamphlets were distributed were important and entitled to weight. Petitioner played precisely upon those prejudices from which at that time insubordination or disloyalty was most likely to develop.

We are not a jury passing on Hartzel's state of mind. Our sole and very limited duty is to decide whether there was evidence enough warranting the trial judge letting the case go to the jury, whether 12 jurymen had warrant for their finding that Hartzel's very purpose was to undermine the will of our soldiers to fight our Nazi enemy, and whether the Circuit Court of Appeals was warranted in sustaining such a finding. We are at a loss to know what other intent is to be attributed to the dissemination of these documents to our soldiery. To adapt the language of Mr. Justice Holmes speaking for a unanimous Court in *Schenck* v. *United States*, 249 U. S. 41, 51, of course the documents would not have been sent unless they had been intended to have some effect, and we do not see what effect they could be expected to

have upon persons in the military service except to influence them to obstruct the carrying on of the war against Germany when petitioner deemed that a betrayal of our country.

As the trial judge aptly stated:

> "All of the circumstances of the case, it seems to me, the very language of the pamphlets composed and distributed by Hartzell show such intent. For what purpose other than hindering the carrying on of the war in any way did he have or could he have had in mind? He appeared on the stand to be an unusually shrewd person. The story he tells of his education and his activities indicate that whatever he does is deliberate and with a definite purpose. He is not a fanatic attached to a cause, having political and economic theories for the liberation of oppressed peoples as were the defendants in *Pierce* v. *United States*, 252 U. S. 239, and *Abrams* v. *United States*, 250 U. S. 616, where Justices Holmes and Brandeis in dissenting opinions found that the literature distributed by the defendants had as its purpose propagating certain economic ideas rather than interfering with enlistment or recruiting or insubordination or disloyalty to the army. In this case the jury were warranted in presuming from the preparation and circulation of the literature that Hartzell intended to obstruct enlistment and recruiting and to cause insubordination and disloyalty in the military service of the United States."

On these facts we would intrude on the historic function of the jury in criminal trials to say that the requisite intent "to cause insubordination, disloyalty, or refusal of duty, in the military or naval forces" was lacking. The right of free speech is vital. But the necessity of finding beyond a reasonable doubt the intent to produce the prohibited result affords abundant protection to those whose criticism is directed to legitimate ends.